

CA20N  
Z 1  
-83H021

31761 11850061 0



ROYAL COMMISSION OF INQUIRY INTO CERTAIN  
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND  
RELATED MATTERS.

Hearing held  
21st floor  
180 Dundas Street West  
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange	Commissioner
P.S.A. Lamok, Q.C.	Counsel
E.A. Cronk	Associate Counsel
Thomas Millar	Administrator

Transcript of evidence  
for

17 MAY 1984

VOLUME 147

OFFICIAL COURT REPORTERS

Angus, Stonhouse & Co. Ltd.,  
14 Carlton Street, 7th Floor,  
Toronto, Ontario M5B 1J2

595-1065





ANGUS, STONEHOUSE & CO. LTD.  
TORONTO, ONTARIO

1

ROYAL COMMISSION OF INQUIRY INTO CERTAIN  
DEATHS AT THE HOSPITAL FOR SICK CHILDREN  
AND RELATED MATTERS.

3

4 Hearing held on the 21st Floor,  
180 Dundas Street West, Toronto,  
5 Ontario, on Thursday, the 17th  
day of May, 1984.

6

7

8

9

10 THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner  
11 THOMAS MILLAR - Administrator  
12 MURRAY R. ELLIOT - Registrar

13 APPEARANCES:

14 P.S.A. LAMEK, Q.C. ) Commission Counsel  
15 E. CRONK )  
16 D. HUNT ) Counsel for the Attorney  
17 L. CECCHETTO ) General and Solicitor  
General of Ontario (Crown  
Attorneys and Coroner's  
Office)  
18 I.G. SCOTT, Q.C. ) Counsel for The Hospital  
19 I. J. ROLAND ) for Sick Children  
M. THOMSON )  
R. BATTY )  
20 B. PERCIVAL, Q.C. ) Counsel for The  
21 D. YOUNG ) Metropolitan Toronto Police  
22 F. KITELY ) Counsel for the Registered  
23 Nurses' Association of  
Ontario and 35 Registered  
Nurses at The Hospital  
for Sick Children

24 (Cont'd) .....

25





ANGUS, STONEHOUSE & CO. LTD.  
TORONTO, ONTARIO

1

2 APPEARANCES (Continued)

3

D. BROWN

Counsel for Susan Nelles -  
Nurse

4

G.R. STRATHY

)

Counsel for Phyllis Trayner -  
Nurse

5

P. RAE

)

C. THOMSON, QC

)

6

F. J. SHANAHAN

Counsel for Mr. & Mrs.  
Dominic Lombardo (parents  
of deceased child Stephanie  
Lombardo); and Heather  
Dawson (mother of deceased  
child Amber Dawson)

9

W.W. TOBIAS

Counsel for Mr. & Mrs. Hines  
(parents of deceased child  
Jordan Hines)

10

11

J. SHINEHOFT

Counsel for Lorie Pacsai  
and Kevin Garnet (parents  
of deceased child Kevin  
Pacsai)

12

13

14

15 VOLUME 147

16

17

18

19

20

21

22

23

24

25

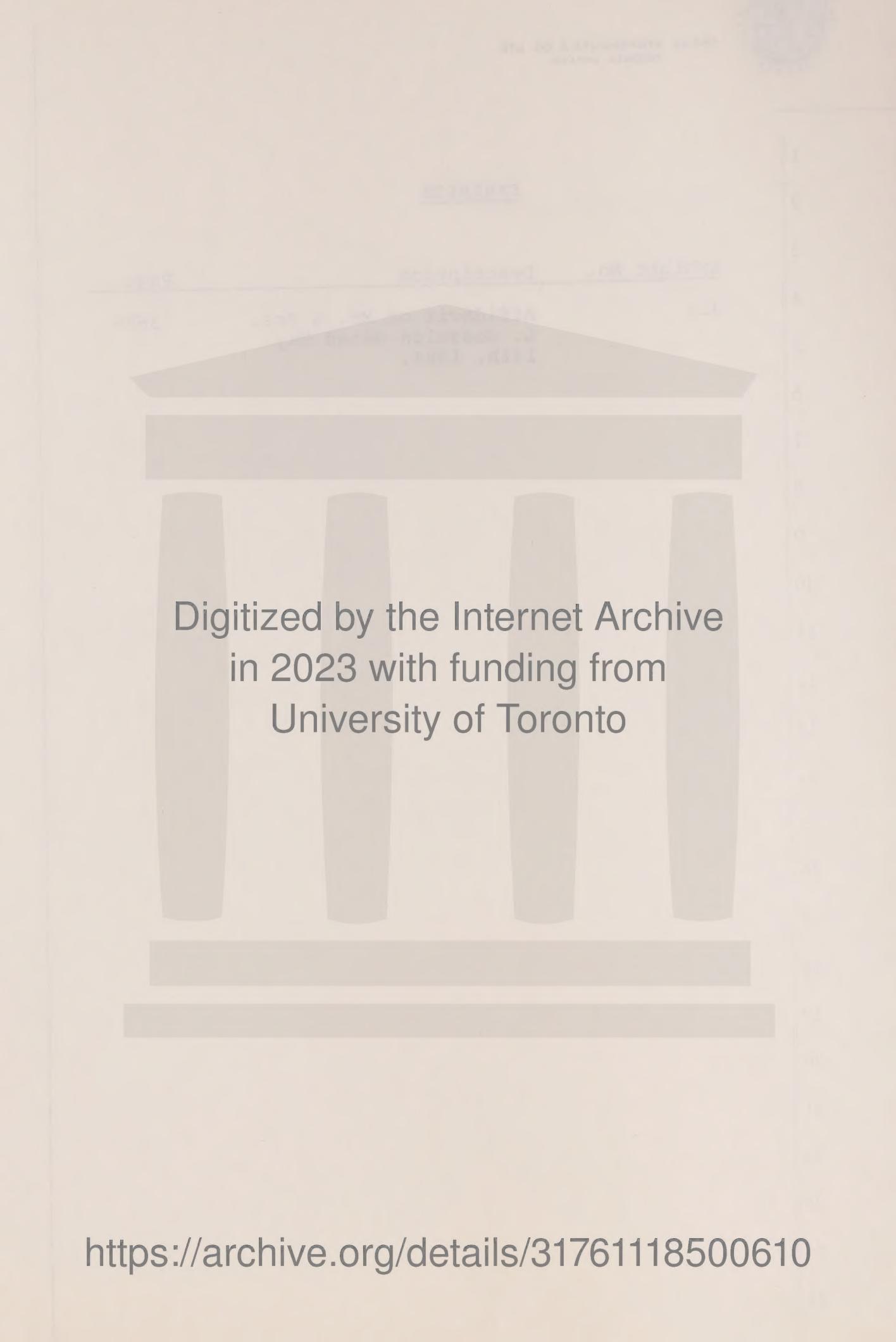




1

EXHIBITS

Exhibit No.	Description	Page
419	Affidavit of Mr. & Mrs. L. Gosselin dated May 14th, 1984.	3686



Digitized by the Internet Archive  
in 2023 with funding from  
University of Toronto

<https://archive.org/details/31761118500610>



May 17/84  
RD/ac  
A-1

1

2 --- (Upon commencing at 10:00 a.m.)

3 THE COMMISSIONER: Mr. Labow.

4 MR. LABOW: Mr. Commissioner,

before you make your statement, I have given  
the Registrar a copy of an affidavit from Lise  
and Lucien Gosselin, the parents of Real Gosselin,  
which I would like to make an Exhibit at the  
Commission. It is a very simple affidavit from  
the parents, setting out their recollection of  
the events leading up to their son's transfer  
to the Hospital for Sick Children, the transfer,  
itself, and the situation during his short stay  
at the hospital and, in addition, it is their  
perceptions of their son's condition and their  
recollection of the events surrounding his death.

15 After some discussion with Counsel  
16 for the Hospital we are still waiting to talk  
17 to the two doctors who are mentioned in the  
18 affidavit from Winnipeg, who I have yet to get  
19 ahold of and the doctor, who admitted this child  
20 to the hospital, who is on vacation, and subject  
21 to talking to them, and possibly calling any one  
22 of them, as a witness to explain the situation as  
they understand it, I would like this affidavit

23

24

25





1

2 entered.

3 MR. ROLAND: Mr. Commissioner,  
4 we have agreed that the affidavit be put in  
5 on the basis that we accept it, as the recollection  
6 and the account of Mr. and Mrs. Gosselin. We  
7 don't agree at this stage, at least to the facts  
8 set out therein, to the extent that they recount  
9 conversations with doctors and information obtained  
10 from doctors, including doctors for the Hospital  
11 for Sick Children. We haven't been able to locate  
12 or at least to speak to the doctors that are referred  
13 to and we are attempting to do that, so we are  
14 quite prepared to have the affidavit entered as  
15 an account of the Gosselin's recollection of the  
16 events, but not for the truth of the facts set out,  
17 until we have had a chance to speak to the doctors  
18 referred to, because you will see that the account  
19 set out in the affidavit is a recollection of  
20 what doctors had said.

21 THE COMMISSIONER: Yes, all right.

22 Does anyone else have any comments on this?

23 Has this affidavit been distributed?

24 MR. LABOW: I do have copies.

25 MR. STRATHY: I wonder, for those





1  
2 of us who have not seen the affidavit whether  
3 we could have an opportunity to read it and then  
4 advise you whether we have any objection to it  
5 being filed as an Exhibit.

6 THE COMMISSIONER: Perhaps we  
7 had better do that first. I think that after  
8 I have made this statement we will rise for a  
9 few minutes so that people can contemplate the  
10 statement and the affidavit before we go on to  
11 the question of argument on Phase I.

12 MR. LABOW: Thank you.

13 THE COMMISSIONER: We will just  
14 hold that for a moment then. Anyone else have  
15 anything preliminary?  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25





A/RD/ln

1  
2 In this Commission I am required, "without  
3 expressing any conclusion of law regarding civil or  
4 criminal responsibility",

5 inter alia:

6 "3) to inquire into and report on  
7 and make any recommendations  
with respect to how and by what  
means children who died in Cardiac  
Wards 4A and 4B at the Hospital  
for Sick Children between July 1st  
1980 and March 31st, 1981, came to  
their deaths;

8  
9 4) to inquire into, determine and  
10 report on the circumstances  
11 surrounding the investigation,  
institution, and prosecution of  
12 charges arising out of the deaths  
of the above mentioned four infants."

13 When the hearings began, we decided for  
convenience to deal with the subject matter of  
14 enumerated paragraph 3 first and that in enumerated  
15 paragraph 4 last and entitled them Phase I and II  
16 respectively. In the course of Phase I a question  
17 arose as to whether I was entitled in my Report to  
name any person I might find to have administered to  
18 any child a toxic dose of digoxin. I held that I was  
so entitled but a case was stated and eventually the  
19 matter reached the Court of Appeal which held that I  
was not. The reasons of the Court of Appeal in so  
holding are attached as Appendix A. The problem now  
20 arises as to the effect of that judgment on Phase II  
21  
22  
23

24  
25





1 and I have expressed the question thus:

2 "Can I, in the light of the recent  
3 decision of the Court of Appeal,  
4 receive evidence or submissions or  
report on the propriety or otherwise of  
the conduct of any person in the course  
of the investigation and prosecution".

5 I think it clear that the words of  
6 paragraph enumerated 4 standing by themselves would  
7 indicate the answer "Yes" but the difficulty comes  
8 from the limitation "without expressing any conclusion  
9 of law regarding civil or criminal responsibility" and  
the effect given to those words by the Court of Appeal.  
10 At pages 14 - 15 of its judgment the Court said "But  
11 the Order-in-Council specifically limits the Commissioner  
12 by forebidding him to express any conclusion of law  
13 regarding civil or criminal responsibility (for a  
14 death or the deaths). In our opinion, such a conclusion  
15 may be expressed by findings of fact which without more,  
16 when found against a named person, constitute a con-  
17 clusion of criminal or civil responsibility." The Court  
18 goes on to say in effect that I may find a child died  
19 from the administration of a toxic dose of digoxin and  
may determine whether the dose was administered  
20 deliberately or accidentally but may not name the  
administrator because to do that would constitute a finding  
21 either of civil (in the case of negligence) or criminal  
22 (in the case of design) responsibility.

23 Susan Nelles has brought action against  
24 the Attorney General and the Metropolitan Toronto  
25





A3

1 Police by Writ and Statement of Claim issued before the  
2 promulgation of the Order-in-Council founding her  
3 action in negligence, in malicious prosecution and in  
4 false imprisonment. The action against the Attorney  
5 General has been dismissed as disclosing no cause  
6 of action but that is under appeal; the action against  
7 the police has not been attacked in summary proceedings.  
8 It is not for me to say whether an action in negligence  
9 without more will lie. It has been pleaded and the  
litigation is pending.

10 The substance of Miss Nelles' claim  
11 is that the police proceeded to charge her precipitately  
12 and without a full and proper investigation. It seems  
13 to me that that is the main issue also in paragraph  
14 4 - Phase II - at least as I originally contemplated  
15 it. If I were to make such a finding - or for that  
16 matter to say the opposite - it would, in the words of  
17 the Court of Appeal, "constitue a conclusion of (criminal  
18 or) civil responsibility." The same thing of course  
19 applies to a finding of malice. Whereas any finding  
20 of murder or negligence in Phase I would not involve  
21 criminal or civil responsibility until the administrator  
22 was named, the same cannot be said for Phase II. To  
23 comment upon the conduct of any crown attorney or any  
policeman would be a comment upon the potential liability  
of the Attorney General and the Metropolitan Police

24

25





1

2 Chief , who are defendants in the Nelles action.

3 Mr. Sopinka has argued that the Court  
4 of Appeal decision in Phase I is based upon constitutional  
5 considerations and the protection of persons from  
6 coercive criminal proceedings whereas Phase II is an  
7 inquiry into the administration of justice and no  
8 constitutional bar exists. I cannot accept the  
9 distinction. The Court did make reference to  
10 constitutional impediments that might have arisen but  
11 squarely based its decision on the restriction as to  
12 findings of civil or criminal responsibility. That  
13 restriction applies as clearly and as much to Phase II  
14 as to Phase I. It is perhaps also interesting to note  
15 that the Attorney General in his statement in the  
16 Legislature upon the introduction of the Order-in-  
17 Council made reference to the pending civil proceedings  
18 (see page 7 - 8 of the attached judgment of the Court  
19 of Appeal) and assured the Legislature that the  
20 restriction would apply to those proceedings as well as  
21 to any criminal proceedings. And the Court of Appeal  
22 put it this way at page 17: "In our opinion the  
23 specific limitation imposed on the Commission by the  
24 Order-in-Council in the circumstances was imposed out  
25 of concern for those persons who might become involved  
in other proceedings or be called upon to stand their





1

2 trial."

3 I am therefore of the opinion that the  
4 Order-in-Council as interpreted by the Court of Appeal,  
5 does not permit me in my report to make any comment  
6 adverse or favourable on the conduct of any party  
7 involved in the investigation or prosecution because  
8 such comment, certainly if it indicated negligence  
9 or malice or the lack of it, would be a conclusion of  
10 civil responsibility or the lack of it. As the Court  
11 of Appeal says, dealing with Phase I (see page 16),  
12 the fact that my findings are not binding in future  
13 proceedings is not determinative; the finding is  
14 enough to breach the injunction.

15 There remain two further problems. The  
16 first relates to the evidence. I think it is  
17 fundamental that I should not - and indeed cannot -  
18 receive evidence that will not be relevant to any  
19 issue I can report upon. I also believe it would  
20 be very unfair to receive any evidence that might  
21 conceivably reflect upon a person's conduct when I had  
22 no power to exonerate him. In Phase I, we received  
23 evidence relating to identity both before and after  
24 the decision of the Court of Appeal. The justification  
25 for receiving it afterwards was that it was  
related to the cause of death, an issue which was





1

2 clearly left for me to determine. In Phase II there  
3 is only the one issue, namely the circumstances of the  
4 investigation and prosecution and those circumstances  
5 do not, if I rightly interpret the Court of Appeal  
6 Judgment, include negligence or malice on the part  
7 of the persons involved.

8 Mr. Hunt has argued that I can proceed  
9 with Phase II drawing the fine line with each question  
10 as to whether its purpose is solely to demonstrate  
11 civil responsibility, or is directed solely or  
12 partially to the circumstances of the event. I can  
13 only say the task would be immensely difficult and it  
14 would probably be beyond my power to make rational and  
15 consistent rulings.

16 In any event, any opportunity I might  
17 have to tread this delicate line has been foreclosed.  
18 Mr. Percival has made it quite plain (as he is entitled  
19 to do) that on the first question that is put to any  
20 of his clients that tends to show why they did or did  
21 not do something, he will object and if I do not sustain  
22 his objection, he will ask for a stated case and  
23 proceed to the courts.

24 And that brings me to the final area of  
25 concern, namely what do we do from now on. One  
solution is to state a case for consideration by the





A6

1  
2 Divisional Court and any other Court to which it may  
3 be taken. The course even with the greatest cooperation  
4 (which we enjoyed in the previous instance) will take  
5 many months and pending the final decision, as I have  
6 said, I do not think it is practicable (and once a  
7 case is stated it may indeed be illegal) to proceed  
8 with the evidence in Phase II. A delay of that  
9 nature can only undermine the whole Commission. I  
10 can of course proceed to the preparation and delivery  
11 of the Report in Phase I but presumably it was  
12 anticipated that the whole report would be received and  
13 made Public at the same time and in any event the two  
14 phases are interrelated, Phase II depending in some  
15 part upon the findings in Phase I and there should  
16 not be a long pause between them. The route through  
17 the Courts is not attractive.

18                   There is another possible solution. The  
19 decision I have reached is based, as it must be,  
20 entirely upon legal principles. It may be that the  
21 decision is not in accord with the intention of the  
22 Lt. Governor-in-Council either at the time the Order-  
23 in-Council was drafted or now. It may be, for instance,  
24 that it was intended that I should be entitled to  
25 comment fully on the conduct of persons involved in  
the investigation and prosecution or it may be that it





A8

1  
2 was intended to authorize certain limited (but  
3 clearly defined) comment. If that is so and if the  
4 intention remains, it can be realized by an amendment  
5 to the Terms of Reference which, if carefully drafted,  
6 would circumvent any further litigation.

7 I have accordingly caused to be  
8 delivered to the Attorney General a letter in the  
9 following form.

10 Dear Mr. Attorney:

11 I enclose a copy of a statement I  
12 intend to make at the Hearings. You will note that I  
13 have decided that in light of the recent Court of  
14 Appeal Judgment, I cannot, in my report on the  
15 subject matter of paragraph enumerated 4 of the Order-  
16 in-Council establishing the Commission, comment upon  
17 the conduct of any persons involved in the investigation  
18 or prosecution. You will also note that I do not  
19 intend to permit evidence to be tendered nor witnesses  
20 to be examined, where the purpose appears designed to  
21 reflect upon such conduct. You will see also that I  
22 anticipate lengthy litigation to determine whether  
23 the decision is in accordance with law and that I do  
24 not intend to proceed with Phase II until the matter  
25 is resolved.

23 If the decision I have felt constrained





A9

1  
2 to reach is not in accord with the intention of the  
3 Lt. Governor-in-Council, perhaps you might consider  
4 recommending an amendment to enumerated paragraph 4  
5 to make that intention clear. That course would not  
6 only ensure that the intent is carried out but  
7 would also circumvent the long delay of the litigious  
process.

8 It is a political and not a judicial  
9 question so I make no recommendation. The interests  
10 represented before me are so diverse that there is  
11 no possibility of making any decision that will be  
12 universally satisfactory. I say only that if I am  
13 to proceed to Phase II under the restrictions as I now  
14 see them, I do not know what public interest will be  
15 served and I doubt that I can produce a valuable Report.

16 Yours very truly,

17 As I indicated before, I think we will rise now for  
18 about 10 minutes and then if you have any comments  
19 that you want to make on this statement that is fine.  
20 If you have any comments that you want to make on  
21 the affidavit filed by Mr. Labow I will hear them  
22 and after that is done we will proceed to the  
question of argument in Phase I.

23 --- Short Recess.  
24  
25





1

2 ---- on resuming.

3

4 THE COMMISSIONER: When I asked for  
5 comments on the statement, I didn't mean favourable  
6 or unfavourable; I meant anything arising out of it.

7

8 Has anybody got any questions on that?

9

10 MR. TOBIAS: I have one question. The  
11 inference, as I read it -- I just wanted to get some  
12 clarification. I take it, from the tone of the statement,  
13 that you will not be calling for people to argue  
14 standing in Phase II to hear some reply?

15

16 THE COMMISSIONER: I thought we could  
17 proceed if everybody assumed the most favourable  
18 position for standing, but I was persuaded out of that  
19 yesterday.

20

21 MR. TOBIAS: Thank you, sir.

22

23 THE COMMISSIONER: So I won't call for  
24 it but, when we finally know what is available in  
25 Phase II, then I'll have to call for it.

1

2 Yes, Miss Kitely.

3

4 MS. KITELY: Mr. Commissioner, you have  
5 indicated in your comments that you have caused the  
6 letter to be delivered. Can I ask when? And the  
7 second question is, if you have any idea when you  
8 are going to have a response?

9

10 THE COMMISSIONER: The answer to the

11

12





1

2 first question is, I think Tuesday afternoon.

3 Is it Tuesday afternoon?

4 MR. HUNT: Yes.

5 THE COMMISSIONER: I also asked Mr.  
6 Hunt to ask his boss not to publish it until I have  
7 had a chance -- but I believe, that when one writes letters  
8 to people, that one should let them see it before  
9 the rest of the world sees it. That's an old-fashioned  
10 view, I know, but it is the one I have, and I have  
persisted in it.

11 MS. KITELY: You don't have any  
12 time --

13 THE COMMISSIONER: I think he has it but  
14 I don't imagine he has made any decision on it, but  
perhaps he has.

15 MS. KITELY: Do you have any expecta-  
16 tion of when there might be a resolution?

17 THE COMMISSIONER: No.

18 MS. KITELY: Thank you, sir.

19 THE COMMISSIONER: Anything else?

20 All right now, let's deal with the  
Gosselin affidavit. Yes?

21 MS. CHOWN: Mr. Commissioner, I feel  
22 I must rise, as Mr. Roland did. I've reviewed the  
23 affidavit and doctors at The Hospital for Sick

24

25





1

2 Children are mentioned in paragraphs 12, 13, 14, 19 and  
3 20 - they are not named, and I understand from Mr.  
4 Labow that is because the Gosselins simply cannot put  
5 a name to the doctors they talked to. I do have  
6 concerns that, through those paragraphs, statements -  
7 through the Gosselins - are being made about information  
8 they received about what action the Hospital was going  
9 to take, that the doctors were going to take concerning  
surgery, the condition, and so on.

10 Again, as Mr. Roland indicated, if the  
11 affidavit is going in simply to say this is the way  
12 the Gosselins recall it - obviously, I can't have a  
13 concern with that. I am not sure these unnamed doctors  
14 are my clients or not. I simply rise because some of  
15 them may be, but I think we will be making attempts to  
16 see if we can identify them and to see if there is  
17 perhaps further or additional information on these points  
raised by them.

18 THE COMMISSIONER: Yes, all right.  
19 I take it you are not objecting to it being filed?

20 MS. CHOWN: No, I don't, as Mr. Roland  
21 said in a limited sense of it being their recollection.

22 THE COMMISSIONER: Any comments,  
23 anyone else?

24 MR. BROWN: I take a similar position.  
25 There is one or two references to Miss Nelles in  
paragraph 18. The references are, perhaps, not very





1

2 important; simply that she came into the room and  
3 later advised the parents of the death of the child.

4 I do not object to the affidavit  
5 going in; however, I do not accept that is the truth of  
6 the contents and I would like an opportunity to  
7 confirm that with my client.

8 THE COMMISSIONER: All right. Miss Kiteley?

9 MS. KITELY: I note in paragraph 16  
10 there is reference to Nurse Nelles and another nurse.  
11 Since that nurse is not identified, it is hard to tell  
12 whether we act for her or not, and I would, there-  
13 fore, reserve -- take the same position as my friends;  
14 namely, that it can go in for the purpose only  
15 put forward.

16 THE COMMISSIONER: Yes, all right. Mr. Labow?

17 MR. LABOW: I just want to make a  
18 few points clear.

19 First of all, I have been trying - and  
20 had some help from many of my friends here - to talk  
21 to the doctors who allegedly took care of this child  
22 in the Hospital and had an opportunity to talk to at  
23 least one. I would like to talk to them at length  
24 and find out if this is an accurate recollection of  
25 exactly what went on; if their perceptions were  
correct.





1

With regard to Nurse Nelles, I asked  
her specifically when she was in the stand if she did  
go to speak to them and if she went in with a doctor,  
and she did not recall.

5

6 No other nurse that I questioned had  
any recollection of doing the same.

7

8 So, my friends' thoughts about what  
9 they feel are on the record, but I don't see how we  
10 are going to be able to find out anything more regard-  
11 ing the nurses, and I do hope to find out something  
more regarding the doctors.

11

12 THE COMMISSIONER: Well, I guess  
13 all we can do is give it a number and we will  
14 wait to see what happens. It may be necessary to  
15 have further evidence. We can have that on June 4th,  
16 whenever we want it, if it's necessary, and we can have  
it.

17

--- EXHIBIT NO. 419: Affidavit of Mr. & Mrs. L. Gosselin, dated 14 May, 1984.

18

19

20

21

22

23

24

25





1

2 THE COMMISSIONER: I will ask everybody,  
3 before insisting upon having further evidence, to  
4 give some concern as to whether the contents of  
5 this affidavit really do bear, or how greatly they  
6 bear upon the cause of death.

7

8 All right? Now, anything else before  
9 we proceed? Yes, Mr. Tobias.

10

11 MR. TOBIAS: Perhaps I am pre-emptying  
12 Mr. Lamek and if I am I apologize for it. Mr. Lamek  
13 and I had a telephone conversation with Dr. Derek  
14 DeSa last Friday and I understand, as a result of  
15 that telephone conversation, Mr. Lamek is now in  
16 possession of a further supplementary report, a  
17 copy of which I will be showing you later today. I would  
18 just like to ask what his present contention is as  
19 to when that will be introduced, as an exhibit and  
20 when copies will be made available to other counsel?

21

22 MR. LAMEK: Mr. Commissioner, Mr.  
23 Tobias is quite right that I have received a letter  
24 from Dr. DeSa. I have not yet provided it to Mr.  
25 Tobias. I had copies made this morning and I expect  
to distribute it to everybody.

21

22 Mr. Tobias' comments are of particular  
23 interest, of course, but so will everybody else's  
24 be. Maybe I can solicit the views of people before

25





1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

reconvene into argument and if there is no objection to it being received I can tender it at that time. If there is objection to its being received then I suppose we will have to hear them and maybe again on June the 4th.

THE COMMISSIONER: All right.

MR. LAMEK: It is a clarification of one paragraph in the DeSa Report relating to the Hines child.

THE COMMISSIONER: All right. I take

it that will be up to everyone within the next 24 hours?

MR. LAMEK: Yes.

THE COMMISSIONER: Thank you. Does that solve your problem?

MR. TOBIAS: Yes, thank you.

THE COMMISSIONER: Anything else?





E-1

RD/ac

1

2

3

4

5

6

7

8

9

MR. LAMEK: One other thing if I

may, Mr. Commissioner. It has been brought to  
my attention that the Toronto Sun of this  
morning has an editorial referring to the  
accommodation, which has been provided to the  
press in these, I mean, quarters and I have a  
copy of that editorial for you, sir. It would  
be of help to you.

Let me be clear, I take no

pleasure in battling the press on these matters.  
I am really not engaged in a protest of Sun  
bashing, but there are comments in this editorial  
which reflect upon a member of the Commission  
staff and perhaps inferentially, too, upon the  
cooperation of the Ontario Municipal Board  
Mr. Chairman. I feel obliged to say something  
about it and I don't know whether everyone here  
has seen this editorial, sir? Perhaps I could  
read it and comment, as I go.

It is headed Bad Style, which  
I take it is intended to refer to the subject  
matter of the editorial, rather than to the writing  
of the editorial.

It reads:

22

23

24

25





1

2 " The Grange commission goes on.

3

Reputations are smeared,

4

accusatory questions are asked.

5

A lot of people are blaming the  
6 press for the mischief of the  
7 Grange commission, which is like  
8 cutting off the head of the  
messanger who brings bad news.

9

It's evident that the real  
10 problem of the inquiry into the  
11 deaths at the Hospital for Sick  
12 Children is not with the press  
13 reporting it or the judge heading  
14 it. The only way to establish  
15 whether babies were murdered is  
16 through proper trial process,  
not with this inquiry.

17

If the press were not there,  
18 the precedent would be set for  
19 closed-door, press-release,  
20 publicly-funded Star Chambers --  
21 which may be what our regulators  
22 and legislators would like, but  
23 they don't make for a free and  
24

25









1

2 next to the drone of the air  
3 conditioner, without a press  
4 table, notebooks on knees  
5 and behinds on hard chairs. "

6

7 Let's be plain about this, Mr. Commissioner.  
8 You have said that the chairman of the Ontario  
9 Municipal Board was generous, indeed, in extending  
10 to us the use of his large hearing room.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25





RD/hr 1

2 We knew from the beginning that we  
3 were not on a long term lease and he was generous  
4 and extended it on a couple of occasions so that we could  
5 get as close to the end of Phase I, as possible, before  
6 we have to move. We all knew that when we moved  
7 we would be into less spacious accommodation .  
8 Indeed, it looked at first as though the only  
9 people, who could be fitted into this room, were  
10 the necessary acolytes , if you will, the Registrar  
11 and the Court Reporters and the myriad counsel we  
12 have here and there might not be room for anybody  
13 else, public or press, and they would have to be  
14 accommodated in the overflow room.

15 Representatives of the news media  
16 came to me about that and told me that it would  
17 be difficult for them to do their job satisfactorily  
18 if they could not be in the same room and in the  
19 result, efforts were made to accommodate them.  
20 That took a good deal of shuffling and if the  
21 members of the press think their accommodation is  
22 a little cramped then they should try sitting at  
23 some of these counsel tables, which are not as  
24 precisely comfortable.

25 We have done our best to accommodate  
them, sir, and in the result there is not lavish





1

2

3

4

5

6

7

8

9

10

11

space or not very comfortable space, but space in this room that has been provided. It is the best that we can do. I am sorry it can't be better. The seats are no harder than they were in the OMB room and they are no more lacking of press table than they were in the OMB room, and with the utmost respect to the author of the Sun's Editorial, the attack is just a little unfair, particularly, upon Mr. Millar, to suggest that he has embarked upon some scheme to exclude the press or to make life difficult for them is grossly unfair.

12

13

14

15

I guess, as senior member of the Commission staff, I feel absolutely obliged to come to his defense and say that is gross and I reject the imputation contained in the editorial . It goes on later:

16

17

18

19

"The Grange Commission has been

evicted from its more spacious OMB

hearing room, and now is packed into

a tiny room."

20

21

I referred to that. There is no possible reflection in any way upon the generosity and the co-operation of the Municipal Board in this manner.

22

23

24

25

"A second one is used for overflow

press and spectators who can watch the





1

4 One wonders about the observation of pettiness  
earlier in this editorial when one reads that.

6 THE COMMISSIONER: How did they know  
it was a bedroom set?

7 MR. LAMEK: We may have to ask that.  
8  
9 "Torontonians want to know what the  
10 commission is up to. It may be that  
11 Millar doesn't want them to know or  
12 wants to separate the press from the  
13 professionals -- the judge, lawyers,  
14 police, bureaucrat and even witnesses  
15 who all form a sort of cosy club that  
has evolved over the past year of the  
hearing.

16 This is not the style associated with  
17 Mr. Justice Samuel Grange and maybe  
18 he'll want to see that Administrator  
19 Millar ceases and desists from making  
it his style."

20 Mr. Commissioner, I don't think I need to say anymore  
21 about the matter. He is unfair to Mr. Millar who  
22 is doing his best to provide accommodation for  
23 everybody in a very difficult situation. I only

24

25





1

2 regret that somebody thought it appropriate to  
3 write such an editorial.

4 THE COMMISSIONER: I can only echo  
5 what you have said, reading this. I have often  
6 thought that some of the things that have been said  
7 about the Commission and Commissioner were unfair,  
8 but it is fair game. I don't think it is fair  
9 game to go after the Administrator. I take  
10 responsibility for everything that has happened and  
11 if something was not appreciated I think they should--  
12 they're going to have to go after me and we have  
13 enough trouble.

14 I also want to say something about the  
15 OMB. The Municipal Board has been extremely good  
16 to us and anytime anybody suggests they have thrown  
17 us out, that is most unfair too. They don't have  
18 perhaps quite the audience that we have and the  
19 Chairman can't stand up in his defense. I want to  
20 say that I made promises to them about five times  
21 and they weren't deliberate lies, but I did really  
22 honestly think that we would be out of there within  
23 a year and I honestly thought, too, that Phase II,  
24 and it did turn out that I was quite right on that,  
25 would not be nearly as popular as Phase I, and we  
wouldn't have the other people here, so I made all





1

2 of those and, of course, the OMB has made its own  
3 arrangements and those of us who are upstairs knew  
4 that there were several instances where the OMB  
5 didn't have the accommodation that they would have  
6 liked to have had. They never once made me live  
7 up to my promise that I would close down. I promised  
8 them that I would close down the hearings for a  
9 day or two if they had something, as they did  
10 have on the Group Homes, but they didn't hold me  
11 to it. We were able to continue the hearings, so  
12 I think it is most unfair and I am not saying that  
13 this editorial really comes right out with it, but I  
14 think the casual mention of eviction, and that sort  
15 of thing that reflects upon the OMB and if I ever  
16 want to get another favour from them they may not  
17 be so keen and I wouldn't blame them.

18 As far as Mr. Millar is concerned,  
19 I repeat again, that he, like the rest of us, try to  
20 do the best we can. If he, in any way, fails, I  
21 think it is only fair for the media to blame me or  
22 perhaps, better still, Mr. Lamek, but not, please  
23 don't blame Mr. Millar because he is only trying to  
24 do the best he can just like the rest of us.

25 All right, with that interlude, can  
26 we get on to Phase I?  
27  
28 -----  
29





RD-ac

G-1

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: Does anybody have any complaints about the general routine, namely starting with the commission Counsel, proceeding in the order in which we have done it, subject to anyone making an exchange, if they want to, right down to Mr. Shinehoft at the end and coming back -- I'm sorry, I didn't mean that -- back, across, or whatever way you want to put the line, back to Mr. Lamek at the end. The reply will be only to what has been said by the Counsel who will follow.

Has anyone any complaint about that? Yes?

MR. BROWN: I have no complaints with the up and down system, or down and up system. I make one suggestion that there be a minor variation in the order, that is after commission Counsel has presented their argument, that Counsel for the Hospital for Sick Children present their argument.

As I indicated to you before, I think they have an interest in the deaths of all of the children. They would have more than us the facilities and resources to review the





1

2 evidence and I think it might be more expedient  
3 that they be put in second and, as I indicated  
4 to you earlier, sir, it might well cut down  
5 on the length of our argument.

6 THE COMMISSIONER: Yes. The  
7 only thing, I think we have been through this  
8 before, I think Mr. Roland or Mr. Scott, somebody  
9 said they would probably like to pause. You  
10 may find that you don't need that pause; I don't  
11 know. There may well be.

12 I suspect commission Counsel will  
13 take the first week. I may be wrong and in which  
14 case we could perhaps adjourn and then you will  
15 get whatever time you need, as long as it is  
16 not more than --

17 MR. SCOTT: Two or three days.

18 THE COMMISSIONER: Do you count  
19 the weekends as two days?

20 MR. SCOTT: We made all that clear  
21 months ago. Miss Thomson tells me why she  
22 requires it and I can't imagine it, but she would  
23 require about two days at least, if Mr. Lamek  
24 takes a week. If he is shorter than that I offer  
25 that as an inducement that we might not require





1

2 quite as much time.

3 THE COMMISSIONER: I'll try to reduce  
4 it, but I am thinking of the fact that surely you can, as  
5 he goes along --

6 MR. SCOTT: Yes.

7 THE COMMISSIONER: -- a lot of  
8 things will be resolved.

9 Well, can I put it this way,  
10 that I will allow you at least two days. If those  
11 two days happen to be a weekend you will have  
at least one extra day. Is that all right?

12 MR. SCOTT: Yes.

13 THE COMMISSIONER: The order will  
14 then change that the hospital will come second  
15 and you will be second last as well. Anyone else  
16 who wants to make a change can make the change  
17 and we will sort it out. As I said before, I  
18 don't mind anyone having two, or even three or  
19 four Counsel, for that matter, as long as each  
20 Counsel deals with a different subject matter, not  
the same thing over again, please.

21 I expect commission Counsel will  
22 provide their submissions between them and I have  
23 no objection to anyone else doing that, as well.

24

25





1

2 Yes, Miss Kately.

3 MS. KITELY: Just a logistical  
4 matter, sir. Is it your plan to sit on Friday  
5 of the two weeks that are aimed for argument?

6 THE COMMISSIONER: It wasn't my  
7 plan.

8 MS. KITELY: Still on four day  
9 weeks then?

10 THE COMMISSIONER: I think so.  
11 I think that is right. It depends upon -- I  
12 don't mind sitting on Friday if that is the only  
13 day somebody is available, but ordinarily we show  
14 Monday to Thursday and we can decide that on the  
15 following Monday.

16 Anything else on that? Mr. Hunt,  
17 you have something that you wanted to say?

18 MR. HUNT: Yes, Mr. Commissioner.  
19 Perhaps I will just outline again the submission  
20 that I made last week when we were involved with  
21 an in-camera session and elaborate on it somewhat.  
22 Some of my friends weren't there.

23 My concern, and I raise it as a  
24 suggestion for your consideration, is with respect  
25 to the argument that is going to be presented to





1

2 you on the question of identity. The situation,  
3 as I see it, that we are in at the moment, is  
4 that the Court of Appeal has clearly said in  
5 your report that you cannot identify anyone that  
6 you may conclude on the evidence was the  
7 administrator of any overdose of digoxin that  
8 killed the baby. Notwithstanding that, we have  
9 received evidence, as pointed out this morning  
10 both before and after the objection of the Court  
11 of Appeal on the question of identity, because it  
12 plays a limited role in the question of how and  
13 by what means the children met their death. That  
14 is, I would think, it helps to or may help to  
15 characterize some of the deaths, as between natural  
16 causes, accidents or foul play.

17 Now, that means that identity, the  
18 issue of identity really plays a supporting role  
19 in your main function on Phase I, which is to  
20 determine how and by what means the children  
21 caused their death.

22

23

24

25





1

2 THE COMMISSIONER: That raises a very  
3 serious problem. I hadn't intended to meet that  
4 until we had the argument. The problem is how can  
5 I consider the question of identity in reaching  
6 the conclusion of the cause of death without, in  
7 effect, breaching the injunction in the Court of  
Appeal.

8

9 MR. HUNT: The Court of Appeals  
10 injunction deals with your final report. It doesn't  
prevent you from considering.

11

12 THE COMMISSIONER: All that I am  
13 talking about is that I consider all the evidence,  
but then what do I say in the report?

14

15 MR. HUNT: That is a problem really  
16 that I appreciate you are in a great deal of  
17 difficulty there and I presume it is because of  
the Court of Appeal had such confidence in your  
ability to sort that out that they left it to you.

18

THE COMMISSIONER: They overdid it.

19

20 MR. HUNT: The line that you will  
have to draw in dealing with that issue in your  
report is one of the fine ones that has been variously  
21 described as difficult, if not impossible, and  
22 perhaps it might be easier to consider that issue  
23 after we have heard the arguments on it and precisely

24

25





1

2 what the positions are. It may not be any easier  
3 then; I don't know.

4 The issue that I am really concerned  
5 with at this point is how to deal with the  
6 argument on that, because if it does play only a  
7 supporting role between the main function you have to  
8 perform on Phase I then there is a danger, in my  
9 submission, that the argument on that issue may  
10 become, may be characterised by the public, as  
11 something that has much more significance in a  
supporting role than it really can play.

12 There are a number of counsel here who  
13 have a duty to their clients to argue that issue  
14 totally before you on the question of how and by  
15 what means the children caused their death and we  
16 have seen over the past months what the public  
17 perception of the Commission's function, insofar  
as getting that evidence, was concerned.

18 I don't direct any criticism at our  
19 friends in the media. It is certainly their duty  
20 to report the evidence, as it is elicited and the  
21 questions that are asked in the course of eliciting it  
22 and I submit that it is your duty to report, as well,  
23 the submissions made by counsel. The danger is that  
24 the submissions that counsel may make on that issue  
25





1

2 may be required to make, in order to discharge their  
3 obligation to the client, may go much farther than  
4 any of the questions that were asked of any of the  
5 witnesses, because counsel will be required to  
6 pull together the various pieces of evidence taken  
7 over a number of months and put them into a  
8 comprehensible package, in order to present them  
9 to you.

10                   In my submission, there is a danger  
11 of the mere fact that a submission is made to you  
12 on the question of identity, referring, as it must,  
13 to the various pieces of evidence that will take on an  
14 importance and significance in the public's  
15 mind, that goes far beyond the role that it may play  
16 in your ultimate decision and, in my submission,  
17 there is a very great danger of reputations being  
18 damaged in a far greater way by the submission that  
19 may be made on that limited issue, than arose during  
20 the course of any evidence that was given before  
21 you.

22                   Faced with that, if I am right in that  
23 characterization of it, I submit you have a balancing  
24 act to perform in dealing with the submissions of  
25 counsel in the context of an open and public inquiry,  
and realizing the role that that issue, and the





1

2 submissions on that issue can play in your ultimate  
3 report, you have to balance that against the interests  
4 of the individuals who can potentially be damaged  
5 by the submissions that will, of necessity, have to  
6 be made by counsel, in order to represent your  
clients.

7

8

9

-----

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25





RD/ac

I-1

1

2                   My suggestion to you for  
3 consideration to handle that is to hear from  
4 Counsel, all Counsel, on the question, the limited  
5 question of identity and how it factors into the  
6 question of how and by what means the children  
7 met their death during an in-camera session. All  
8 of the rest of the arguments, in my submission,  
9 should be held in public and any need during the  
10 public arguments to refer to arguments made  
11 in-camera can be dealt with, if, as and when, it  
arises at the time, and I stress --

12

13                   THE COMMISSIONER: It would be  
14 awfully difficult for Counsel, as well as for  
15 me, wouldn't it? Wouldn't it be awfully difficult  
16 on the public part not to make reference to  
17 something I may have said in the in-camera session?

18

19                   MR. HUNT: It might be difficult  
20 but it is certainly not impossible, knowing at  
21 the outset that that is the way the matter would  
22 be dealt with, and I think Counsel can prepare  
23 themselves to present their argument in both  
24 forms, in such a way as to minimize the need and  
25 difficulty in referring to what may have been  
said in-camera. It is difficult, I agree, but





1

2 I certainly wouldn't consider that, from my  
3 point of view, impossible.

4 I make this submission to you,  
5 as a suggestion, that certainly it is your  
6 decision, procedurally, how to handle this and  
7 I submit that this is one way in which a very  
8 serious problem and very serious danger that  
9 poses difficulties, not just for the individuals  
10 concerned, but also for the commission and the  
11 public perception of the commission's function to  
12 be handled, balancing all of the interests and  
13 arriving at a satisfactory solution, which I  
14 concede may be difficult, but certainly not  
15 impossible, and viewed against the other prospect,  
16 in my submission, is preferable.

17 THE COMMISSIONER: Thank you. Do  
18 you want to go first?

19 MR. THOMSON: I think that perhaps  
20 it would be appropriate if I could say something  
21 now, both in response to what Mr. Hunt has said,  
22 and in response, Mr. Chairman, to a much broader  
23 issue that I think you have to address.

24 Before the argument begins, I ask you  
25 to make a finding, as to whether it is appropriate





1

2 in argument at all, in public or in-camera, to  
3 allow Counsel to make and develop submissions  
4 that suggest that any individual may have  
5 deliberately injected digoxin into any baby.

6 THE COMMISSIONER: You know,  
7 Mr. Thomson, that telling Counsel what they can  
8 or cannot say is one of the greatest departures from  
9 our system that I can think of, and to say  
10 you cannot argue that, the only basis for not  
11 arguing is that it has no relevance. Mr. Hunt  
12 seems to think it has some relevance.

13 MR. THOMSON: Let me put this  
14 to you: first, it is important to remember that  
15 the ground rules of this Commission changed dramatically  
16 as we came to the very end. I mean by that, sir,  
17 the decision of the Court of Appeal that said you  
18 were wrong, in your view, that you could name  
19 someone whom you found might have injected digoxin  
20 in an unauthorized way. That is very important,  
21 because up until the decision of the Court of  
22 Appeal, for instance, the Atlanta Report was admitted  
23 without objection. All kinds of questions were  
24 put and all kinds of evidence. Now, what the  
25 Court of Appeal has essentially decided, in my





1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

submission, is that you may not name someone who may have been responsible for one of these deaths, due to digoxin overdose if you find one, and, secondly, it is implicit in what the Court of Appeal has said, strongly implicit, that you must not make findings that lead inevitably to that conclusion. That is the line that I want to address this morning, because what I was saying, sir, really comes out of something that appears at page 4 of the decision that you rendered this morning.

I didn't rise with respect to the discussion on Phase II, because I think the issue is more importantly dealt with here. This is an argument, sir, that I raised just before my client was about to give evidence, the discussion.

I want to read out loud the bottom paragraph:

" There remainstwo further problems. The first relates to the evidence. I think it is fundamental that I





1

2

3

4

5

6

7

8

9

should not - and indeed cannot - receive evidence that will not be relevant to any issue I can report upon. I also believe it would be very unfair to receive any evidence that might conceivably reflect upon a person's conduct when I had no power to exonerate him. "

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

If I take that to be so and I take that statement to have application in count I, in Phase I, how much more unfair is it to allow Counsel for the Attorney-General, Counsel for the Police Force, to stand up in public and, in effect, make allegations that amount to allegations of Murder, because that is what the identity issue is all about.

26

27

28

29

30

31

32

33

34

35

THE COMMISSIONER: They want

to make them in private. That is what Mr. Hunt has been asking for.

MR. THOMSON: That is what Mr. Hunt is asking for. Can I tell you where I am going? I am saying that they should not be allowed to make them at all for reasons that I am attempting to develop, sir. They should not be allowed to





1

2 make them at all in public or in private and,  
3 secondly, in the alternative, if they are allowed  
4 to make such allegations, they ought to be  
5 required to make them in-camera, in private,  
6 essentially for the reasons that we have been  
discussing here.

7

8 You see, there is a practical  
9 problem here that we might as well face right  
10 up to. If you are going to make findings exonerating,  
11 let me say the doctors, the hospital, the, "the, the,  
12 the" and by the end of it it points a finger,  
13 then with respect, that will be terribly unfair  
14 and that is what troubled me when I dealt with  
15 this question of exoneration earlier on in my  
16 argument, because what we end up doing is by  
17 implication, like my client continues to be on  
trial.

18

19 THE COMMISSIONER: I don't want  
20 to pre-judge this issue. I think it is going  
21 to come up. I am with you so far on that. I  
22 am with you certainly that we can't exonerate  
anyone if I can't condemn anyone.

23

24 MR. THOMSON: And let me say that  
I don't want you to pre-judge, and I know you won't,

25





1

2 sir, but I am asking you, with respect, to  
3 judge this issue before anyone argues, because  
4 otherwise there is no point in the judgement,  
5 because I adopt what you said here that it is  
6 fundamental, and if, as you said in your reasons,  
7 that:

8

9 " It is fundamental that (you)  
10 should not - and indeed cannot -  
11 receive evidence that will not  
12 be relevant to any issue I can  
13 report upon. "

14

15 It, in my submission, equally follows that you  
16 should not allow people to be making arguments,  
17 either publicly or privately, on issues that  
18 you cannot spell out and develop in your report.

19

20 THE COMMISSIONER: You see, what  
21 I am trying to say here is that there is a  
22 difference between Phase I and Phase II. That  
23 is what I am faced with. If there is something  
24 left in Phase I that I am required to find out  
25 and report on how the children died, I have to  
reach a conclusion. What Mr. Hunt said was that  
the evidence of identity is maybe helpful in that  
connection. If I accept his argument with which I





1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

may or may not accept it may or may not accept it, if I accept his argument, surely I have to let him put that argument. Do I not have to let him put the argument? The problem is do I do it in public or private? In private it goes against the grain of everything I have ever stood for.





1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. THOMSON: I appreciate that, but you do have to balance the various interests. The Court of Appeal has said that. My friend has referred to it, a task, which comes at the extreme level is impossible and the Court of Appeal told you on what side you should weigh.

THE COMMISSIONER: But I think Mr. Scott persuaded me that what the Court of Appeal said there only applies to the report. I at first thought it did apply to the evidence, but then he said: "Where such an impasse arises it should be resolved, in our opinion...", that is at page 19. "...by a course best protects the civil rights of the persons the limitation was designed to protect." Certainly the limitation is without expressing any conclusion of law regarding civil or criminal responsibility. I don't know, but he certainly persuaded me then.

MR. THOMSON: He did, but I have another shot at it.

THE COMMISSIONER: All right.

MR. THOMSON: You see, let's take that as a starting point. It is only in the report and let me take that for purposes of discussion. There are two other elements that you have to bring





1

2 into play, though, and that is, are you prepared  
3 to accept as a principle applicable in Phase I,  
4 as in Phase II, because I urge that you should.  
5 I say that take it now and from this point forward,  
6 whatever we did before when we thought the ground rules  
7 were different is a different matter, sir.  
8 From this point forward surely you should not  
9 receive, either evidence or argument not relevant  
10 to an issue you can report upon. Secondly, in  
11 deciding what is the issue that you can report  
12 upon then you have to remember that if you don't  
13 have the power to exonerate and you don't have the  
14 power to blame, and you can't do either, you can't  
15 either exonerate or blame by process of elimination  
16 or by inference or by process of reasoning, if that  
17 follows, sir, then I put it back to you that the  
18 arguments that you will hear is not of use.

19 You see, as I understood the process  
20 that you perhaps could follow, is what I thought you  
21 were saying to me the other day in your reasons,  
22 is that while I may not be able publicly to give  
23 the reasoning process through which I go, I may  
24 be able to make a finding in a report that is  
25 completely silent as to the basis upon which I  
arrive, as to the route that I have used, because





1

2 to lead the public down that route points into  
3 certain doors which I am not allowed to point  
4 directly or indirectly, but perhaps I can make some  
5 findings saying that on the basis of what I have  
6 heard here that I am satisfied that one child may  
7 have died from digoxin poisoning, perhaps another  
8 did or others did, I don't know, with the varying  
9 degrees of certainty that you might decide in  
10 looking at the evidence, but it seems to me to  
11 be quite plain from looking at what the Court of  
12 Appeal is suggesting to you, and what, as I argue  
13 here in fairness, that if you chase down all the  
14 areas that were explored in evidence, in cross-  
15 examinations and in suggestions, then you are  
16 claiming indirection, going to be back into  
17 the process in which what we have is a trial of  
18 these people who are allegedly implicated.

17

18 So in the first place I say this to  
19 you: if it is not possible for you to draw a  
20 conclusion from the arguments in your report,  
21 because so to do is to violate the injunction of  
22 the Court of Appeal, then surely it is wrong for  
23 you to allow argument on those issues in either  
24 public or private.

23

24

25

You see, on the one side, sir, there





1

2 is a clamour from the press and we just heard about  
3 the Sun Editorial this morning saying, "Let the  
4 public know". All right, that is one side of  
5 it. Surely, with respect, the public right to  
6 know, as is reflected here, is always subject to  
7 your discretion. So far you have been the most  
8 generous, in terms of public perception of any  
9 Commission that I am familiar with, sir, because  
in general terms --

10

THE COMMISSIONER: Generally

11

Commissioners are pretty generous. It just doesn't  
hit them between the eyes they way mine has. They  
have always been open, but nobody wants to hear.

12

13

14

15

-----

16

17

18

19

20

21

22

23

24

25





1 hr

2  
3  
4  
5  
6  
7  
8  
9  
10

MR. THOMSON: We now have again, in terms of public perception, the press wants to hear, yet, what is left, frankly, in terms of Phase II effectively gone, from looking at, from listening to your report this morning, what is left is simply a determination in public terms of the cause of death, which, by indirection, involves a continuing public scrutiny and public argument and the rest of it of my client. I find that offensive and I know you do, too, personally.

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I am saying that in terms of examining the process surely it is appropriate now that we put together the various principles. You have a discretion, you have already said to me, or said to us in your report this morning, you should not receive evidence that you can't decide upon. If you can't exonerate and blame, then why allow people to stand up here making accusations at other people, at other parties to the process, because from listening to Mr. Hunt, that is what is going to happen. I am not saying that he said that that is what he is going to do, although from listening to his cross-examination he well might.

Again, I must admit that there is something troublesome about that because





1

2 you know who Mr. Hunt represents.

3 I, therefore, simply, to go back  
4 at this, say that I would hope that for essentially  
5 resolving many of the other procedural issues  
6 that arise, the first question, and I know you  
7 have resisted my suggestion earlier, because you  
8 may recall when Mr. Scott and I argued the earlier  
9 position, I then attempted to ask -- I asked you  
10 to make up your mind, as to what you proposed to  
11 do in the report. You raised the question with Mr.  
12 Hunt this morning, indicating that you are puzzled,  
13 and I can well understand, why, sir. Mr. Hunt  
14 wasn't able to satisfactorily answer the question.  
15 I can't tell you that I have adequately answered  
16 it either, but until you come to grips with how  
17 you are going to address the issue in the report  
18 you are really not going to be able to satisfactorily  
19 resolve the question that I pose. If the argument  
20 isn't going to be useful don't let them make it,  
21 particularly, because it is the kind of argument  
22 that tramps all over the civil rights of people  
23 in this kind of proceeding, which has already been  
24 characterized by you and others as coercive .

25 MR. LAMEK: No, no.

26 MS. CRONK: No.

27

28





1

2 THE COMMISSIONER: I am sorry about  
3 that. I have never characterized these proceedings  
4 as coercive. No one has been required to attend,  
5 to give evidence at any point. Argument has never  
6 been made and I always reserve the position that I  
7 might take if one declined to give evidence.

8

MR. THOMSON: Let's have it out.

9

As far as I am concerned, and I think the Court  
of Appeal characterized it, this proceeding --  
and I don't want you to think that what I am saying  
is offensive at you or Mr. Lamek. It is coercive  
in its nature, sir, because the Public Inquiries  
Act required my client to be here and if she didn't  
come she would have been required to be here, sir.

10

THE COMMISSIONER: I never said that.

11

I never said that at any time to anyone and the  
issue was never raised. I did not require it.

12

Everyone came voluntarily. There may have been a  
few subpoenas issued because people asked for them  
but I never told anyone. It was clear to everyone  
that the issue had not been decided, and it wouldn't  
be decided until it was raised.

13

14

15

-----

16





hr 1

2 MR. THOMSON: I think, with respect,  
3 it is academic to suggest it is other, because  
4 the people who are each involved, Mrs. Trayner,  
5 particularly, by the nature of the process, by  
6 the mandate you were given as I have said this  
7 before, has been put on trial publicly for murder.  
8 That is the process.

9 As I say, I am not here to criticize  
10 you for that. She has had no choice, but to  
11 participate and try to defend herself here. Now what  
12 I am asking you to do is to look at the final  
13 stages in terms of what you are going to allow  
14 people to say in argument and what you are going  
15 to say in your report. All I have been urging you  
16 to do is, because of the nature of this kind of  
17 process, to let us know now what you are going to  
18 do in the report, so that we can deal effectively with  
19 what people should be allowed to say in argument.

20 THE COMMISSIONER: I am going to  
21 ask you at some point to tell me what I can do in  
22 the report and that is one judgement which you  
23 won't get until you get the report, because I  
24 honestly won't know until the last line is written.  
25 So I can't -- I made a decision, as to what I would  
do in the report and look what happened to me? So





1

2 I am going to make this one very slowly and very  
3 carefully.

4 MR. THOMSON: I realize I, of course,  
5 meant what kinds of things you were entitled to  
6 decide. If you don't decide that, that is, what  
7 kinds of questions you are entitled to answer and  
8 how it is going to be very difficult for counsel  
9 to know what kinds of argument to put forward.

10 THE COMMISSIONER: What you have to do  
11 is answer the arguments that are put by -- one  
12 way of answering is to say that it is totally  
13 irrelevant. You have been in Court -- I was going  
14 to say since the turn of the century -- it is not  
15 quite as long as that, but you know the way you  
16 deal with argument. Sometimes your opposition  
17 makes speeches and arguments and you dismiss them  
18 as having nothing whatever to do with it. Sometimes  
19 you are a little worried about them and you answer  
20 them and sometimes you are very worried about them  
21 and you have a long harangue on the subject. That  
22 is the way you have to deal with it. If Mr. Hunt  
23 thinks this is relevant, you have to deal with it.

24 I think what we are really talking  
25 about now is how we do it and whether the interests  
are such -- reading the section here:





1

2 "All hearings on an inquiry are open  
3 to the public except where the  
4 Commission conducting the inquiry is  
5 of the opinion that."

6

7 Public security is one of them and it is hardly  
8 that.

9  
10  
11  
12  
13  
14  
15  
16

7 " (b) intimate financial or personal  
8 matters or other matters may be  
9 disclosed at the hearing that are of  
10 such a nature, having regard to the  
11 circumstances, that the desirability  
12 of avoiding disclosure thereof in the  
13 interests of any person affected or  
14 in the public interest out weighs the  
15 desirability of adhering to the  
16 principle that hearings be open to the  
17 public... "

18  
19  
20  
21  
22  
23

17 It is not crucial ., but it means that I have to  
18 decide. Isn't that somewhere along the line, as to  
19 what the interests are, whether public interests  
20 or the interests of the persons affected are such,  
21 but there is no question that the fundamental  
22 principle is that they are open to the public, and  
23 I have to have very good reason for not making them  
24 open to the public. You can revise your argument as  
25





1

2 well as to --

3 MR. THOMSON: I just want to adopt  
4 what you said at page 4 and the reasons you read  
5 this morning. If you do not have the right to  
6 exonerate my client of the accusations of murder,  
7 which she has been faced with in the course of this  
8 hearing, then you should not allow any counsel  
9 to stand up there and accuse her. I put it to you  
10 that simply, sir. That is wrong. Whether it falls  
11 within the meaning of that or not, surely that has  
12 got to be right. If you don't have the right to  
13 exonerate my client of the accusations of murder  
14 then you shouldn't allow counsel to stand up and  
accuse her directly or indirectly.

15

THE COMMISSIONER: Thank you.

16

MR. SCOTT: Mr. Commissioner, just  
before we get back to Mr. Hunt, in view of the  
exhortation --

17

THE COMMISSIONER: It will be a long

time before we get back to Mr. Hunt.

18

MR. SCOTT: In view of Mr. Thomson's  
request, I would like to weigh in with the assertion that  
whether you want to decide the question that he  
presents to you or not is beside the point, because  
the Court of Appeal has already decided it for you

19

20

21

22

23

24

25





1

2 and the pages of holy writ, to which I referred,  
3 are pages 15 in the text and 18 and page 15, the third  
4 line from the bottom, canvassing this very question  
5 of evidence, argument and report, the Court said:

6 "He (that is you) has no discretion... "  
7 I emphasize that, because Mr. Thomson said that you  
8 had a discretion.

9 "He has no discretion that would permit  
10 him to decline to make a finding of  
11 intent or state of mind relative to  
12 the cause of death in order to make  
13 a finding identifying the person  
14 responsible, because in his view of  
15 the interests it would be better to  
16 do so".

17 You can not, therefore, decline to make a finding of  
18 intent or state of mind relevant to the cause of  
19 death and that is going to take you --

20 THE COMMISSIONER: I can certainly,  
21 I can decline to make such a finding, because it is  
22 not available.

23 MR. SCOTT: Yes, of course, but if the  
24 evidence warrants and attracts you, you cannot decline  
25 to make a finding of state of mind relevant to the  
cause of death and that, of course, leads you to the





1

2 question of precisely whose mind are we talking  
3 about when we are deal with the state of mind.  
4 So this matter will have to be argued. It may not  
be reported on.

5

6 Then further, as if there were any  
7 doubt left, the Court of Appeal dealt with  
8 it at page 18 in terms of essentially evidence,  
9 argument and report. It says at about the 8th line  
from the bottom:

10

11 "The Commissioner is obliged to hear  
12 all of the evidence relating to the  
13 cause of the death of the children  
14 and this would include evidence  
15 which tended to show that one or more  
16 of them died as a result of unlawful  
17 or negligent acts."

18

19 And that we have done.

20

21 "While the Commissioner must not  
22 identify an individual as being legally  
23 responsible for a death, he should..."

24

25 And that is the report.

26

27 "...he should analyse and report..."

28

29 Now, analysis and report, mean, in my respectful  
30 submission; hear argument about, analyse yourself  
31 and then report on what?

32

33





1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

"...upon all of the evidence with  
respect to the circumstances of each  
death and if he can, make recommendations  
with respect to that evidence."

Now, it seems to me interesting, though Mr. Thomson's  
submission may be, an attractive though you may  
find it as a generally abstract matter, the Court  
of Appeal has decided the parameters that are  
imposed by you on the Order in Counsel.

I will have something to say about  
Mr. Hunt's motion.

THE COMMISSIONER: Yes, all right Mr. Brown.

--- Short Recess.

-----





1

hr

2

---On resuming

3

THE COMMISSIONER: Yes, Mr. Brown.

4

MR. BROWN: Yes, sir. As a matter of general principle, sir, I support the logic of Mr. Thomson's argument and agree that if you cannot report on the identity of the administrator of a drug causing the death of a child, you should not be entitled to hear argument on the same issue.

9

After the Court of Appeal decision you heard argument on the evidence that you could hear and whether the Court of Appeal decision --

10

11

THE COMMISSIONER: Supported the idea?

12

13

14

15

16

17

18

19

20

21

22

MR. BROWN: I did support it, sir, but at that time a submission was put to you that you had essentially two functions: that first you had an inquiry function and Mr. Scott put to you very forcefully that the hearing of evidence should be allowed, the fullest hearing of evidence should be allowed in order to allow the public to have a window on the events that transpired at the Hospital. You ruled it in that favour and the evidence has been in and there has been the fullest airing of the evidence.

23

24

The second function which was described

25





1

2 was that of a reporting function and the Court of  
3 Appeal restricts you, sir, in that function. It  
4 would be my submission that the argument put to you  
5 is directed more towards that second function that  
6 you are restricted than in the first. For that  
7 reason the nature of argument on evidence put to you  
8 should be tailored to accord with the prescriptions  
9 placed by the Court of Appeal. If, however, you  
10 decide it is not limited I have some difficulty  
11 with the proposition that argument should be held  
12 in-camera. To date, all the evidence has been held  
13 in public. Any allegations made against Miss Nelles  
14 have been put to her in public and she has applied  
15 to them in public. I would not want the public to  
16 be left with the perception that there are outstanding  
17 matters put to her, which are so sensitive that the  
18 public could not hear them and there was something  
19 else left to explain.

20

I also have difficulty, sir, with  
21 hearing the argument in-camera, because if evidence  
22 of identity --

23

THE COMMISSIONER: There will be no further  
24 evidence submitted. Submissions will be made. Is  
25 that what you are concerned about, that there might  
be submissions made . respecting her that the





1

2 public might have the impression that submissions  
3 were made respecting her?

4 MR. BROWN: That is correct, that  
5 there was something said about Miss Nelles that  
6 wasn't made directly apparent to the public in  
evidence.

7

8 THE COMMISSIONER: I wouldn't like  
9 that either, but the problem is what happens with  
the submissions. Isn't that what you meant?

10

11 MR. BROWN: I will address that in  
12 a moment, sir. It is something that Mr. Hunt  
said in that respect that does concern me.

13

THE COMMISSIONER: Yes, all right.

14

15 MR. BROWN: That is one consideration  
16 I have with the in-camera. The second thing,  
17 whether or not to hold it in public or in-camera,  
18 is that it has been argued upon you, sir, by Mr.  
19 Hunt, that the evidence, with respect to identity,  
20 can assist you in characterizing the death, as  
21 being perhaps a death by natural cause or a death  
22 by deliberate action. I assume, sir, that would  
23 assist you where the medical evidence might be  
24 ambiguous or ambivalent and that the presence of  
25 a person or persons might tip the scale in the  
presence of that difficult medical evidence, in





1

2 allowing you to determine how they died. If that  
3 argument is restricted to in-camera what, then,  
4 sir, would be the absence of a person? It would  
5 be my submission, and certainly we would want  
6 to be able to argue, that the absence of Miss Nelles  
7 when certain children died suggests that she had no  
8 involvement in the deaths of any of the children.

9                   If you say that arguments with  
10 respect to presence, must be held in-camera , we  
11 do not want to be shackled, so that we cannot  
12 say her absence indicates that she is innocent  
13 of any wrong doing. That is another difficulty  
14 that we have.

15                   THE COMMISSIONER: Could you say that  
16 in-camera if you wanted to?

17                   MR. BROWN: We could say that in-  
18 camera, but it is something that we want to say  
19 in public. It was said in public at the preliminary  
20 inquiry and subsequently reported.

21                   THE COMMISSIONER: That is the fundamental  
22 problem about all of this is that no naming names  
23 means no exoneration. What do I do with that?  
24 Obviously I can't.

25                   MR. BROWN: Obviously in the report,  
26 but you are now entertaining the proposition that one





1

2 can inculpate an argument. Surely the converse  
3 applies as well. Counsel can exculpate an argument.  
4 We cannot be restricted in doing that.

5 THE COMMISSIONER: Are you suggesting  
6 that perhaps we could allow people to exculpate  
7 an argument, but not inculpate?

8 MR. BROWN: No. If you do one, sir,  
9 I submit logic dictates that you must be able to  
commit the other.

10 THE COMMISSIONER: Thank you.

11 MR. BROWN: With respect to the  
12 damage that submissions might have on the reputation,  
13 Mr. Hunt, in his submission to you, stated that  
14 the submissions may go much farther than any question  
15 asked of a witness and that he had some concern  
16 with that, because there might be injury or damage  
17 to a person's reputation. It is my submission,  
18 sir, that the general principles of argument in  
19 cross-examination should apply in this inquiry and  
20 that if an allegation was not put to a witness  
21 in cross-examination, counsel cannot later, in  
22 argument, raise that allegation against that  
23 particular person.

24 THE COMMISSIONER: Is there any  
25 allegation that was not put to someone in evidence?





1

2 I missed it if there was one.

3

4 MR. BROWN: All I am saying is that  
5 if certain counsel intend to make allegations  
6 against Miss Nelles that they did not put to her  
7 in her cross-examination, I submit that that is  
8 fundamentally unfair and shouldn't be allowed.

9

10 Those, sir, are the submissions I  
11 have.

12

13 THE COMMISSIONER: All right, thank  
14 you.

15

16 Yes, Mr. Young.

17

18 MR. YOUNG: Sir, inspite of the  
19 opinion of certain newspaper editors it is our  
20 belief that this Commissioner has been a fair and  
21 open inquiry, public inquiry.

22

23 We are not aware of any evidence  
24 being heard in-camera todate. We stress that, and I believe  
25 Mr. Lamek said that earlier, and we cannot stress  
that enough.

26

27 You have been asked to perform  
28 numerous impossible tasks or almost impossible  
29 tasks throughout the course of these proceedings  
30 or tasks that certainly have been described as that.  
31 We, sir, are not asking you, at this time, to  
32 perform a task that we would consider impossible,

33

34

35





1

2 that is, to report in a public report upon argument  
3 that we would hear in-camera.

4 I would say to you, sir, that any argument  
5 we will be making, will be based upon evidence  
6 that you have ruled relevant and it is our position  
7 that if your report is going to be public and,  
8 of course, it must be, the argument must be public.

9 THE COMMISSIONER: Thank you. Mr. Scott?

10 Mr. Roland?

11 MR. ROLAND: Sir, the Hospital's  
12 position is that this is a public hearing and it  
13 has been public throughout and it should continue  
14 to be but the argument is one that should carry  
15 on in all aspects in public and that it would be  
16 a shame if the public was denied the opportunity  
17 of hearing the conclusions that all counsel seek  
18 to draw from the evidence that they have heard in  
19 this public forum.

20 Mr. Thomson has indicated this has  
21 been, in many aspects, through the way in which  
22 witnesses have been examined, the trial of his clients,  
23 and that the allegations have been made through the  
24 questioning, that the manner of questioning, that his  
25 client has had allegations made against him tantamount  
to murder -- actually used the word, 'Murder', this morning  
and it is no secret in the





1  
2 public and in this hearing room that those  
3 allegations, in a sense, have been made through the  
4 questioning and so on. It is not going to be  
5 surprising to anybody if one party or another  
6 makes the same suggestion or allegations in terms  
7 of summing up the evidence and putting the propositions  
8 to you, and as Mr. Scott indicated this morning,  
9 you have an obligation to decide whether or not  
10 some or other of these babies were intentionally  
11 administered an overdose of digoxin. That is something,  
12 that seems to me, being your mandate, have a right  
13 to hear from the various parties their conclusions  
14 to be drawn from the evidence.  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

-----





RD/ac

N-1

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

It would be, I think, a shame  
if the public was denied that opportunity and  
it would be a shame if the public had a difficulty  
understanding your report, as restricted as it  
may have to be, by the decision of the Court of  
Appeal because they have not heard the arguments.  
So in summary, as far as the Hospital --

THE COMMISSIONER: No one except  
Counsel will put together any arguments and the  
report, assuming any gaps. I can't imagine  
anyone doing that. I can't even imagine the  
press doing that. They might, or some very  
learned ladies and gentlemen of the press, who  
might be able to do it but the casual reporter  
certainly couldn't. The one who just picks up  
the report couldn't do it and wouldn't be able  
to do it.

My problem is this: basically what  
I am concerned about is the fact that it is the  
headlines that will come out that Mr. so and so  
alleges that so and so committed all of these  
murders.

MR. ROLAND: There are people  
here who will argue the converse, that is, they will





1

2 deal with those arguments, that they are representing  
3 the various interests, and will deal and confront  
4 and the process permits them to confront those  
5 arguments, to deny them and rebut them and to  
6 point you to the evidence that goes in another  
7 direction. All of that can be fully canvassed  
8 before you. In a sense the problem -- Mr. Hunt  
9 raises the problem for the client, but, with  
10 great respect, it isn't a problem for you, as  
11 a Commissioner here, hearing the argument.

12

13 THE COMMISSIONER: If you promise  
14 to open all my mail and collect the newspapers  
15 before I get up in the morning so that I won't  
16 have a chance, and clear out all the television sets  
17 and all the radio sets and roundabouts so that  
18 I will be shielded from all of this, then I  
19 will be happy to go along with --

20

21 MR. ROLAND: I would have thought  
22 by now you would have grown a little immune --

23

24 THE COMMISSIONER: A little, but  
25 not quite totally yet, however, thank you very  
much.

26

27 Miss Chown, where is your vote?

28

29 MS. CHOWN: I am voting along with

30

31





N-3

1

2 Mr. Roland and I will simply comment on some of  
3 his latter comments and your responses.

4 You said that you think it is  
5 unlikely that the members of the public and the  
6 members of the press will be doing a matching  
7 game, as to where argument is done by Counsel, and this  
8 does often not end up in your report. You said  
9 that you are concerned about large headlines that are  
10 reported on the basis of the argument. We have, throughout  
11 this process, said it is important if your report  
12 is going to have the effect that you and others here would  
13 wish it to have that the public perceives this  
14 system as being a fair and open one. We have been in-camera  
15 before and if you go in-camera I think the inference will  
16 be in the public mind that you have heard submissions  
17 that in some way influenced your report on a day when the  
18 public were not able to assess those submissions,  
19 themselves. I think that that kind of inference,  
20 whether true, in fact, or not would cast a cloud  
21 on your report that would be unfortunate.

22 I would support that the argument  
23 be made in public.

24 THE COMMISSIONER: Yes, all right.

25 Thank you.





1

2 Miss Kitely?

3 MS. KITELY: Could we change  
4 the order on this, sir, and could I be allowed  
5 to go after the parents?

6 THE COMMISSIONER: I don't know  
7 how the parents feel about that.

8 MR. TOBIAS: I have been quite  
9 used to Miss Kitely preceding me. I would be  
10 heartbroken, sir, if you altered that pattern.

11 MS. KITELY: The only reason  
12 I ask, sir, is because I have the position that  
13 it would assist me if I would hear from parents  
14 before I took it. I don't know whether there is  
15 any cohesiveness there or not.

16 THE COMMISSIONER: I think  
17 Miss Kitely is really speaking to you, not to  
18 me. What is your position?

19 MR. SHANAHAN: I don't mind  
20 from my part, Mr. Commissioner. If something  
21 develops there that I want to respond to because  
22 of the way arguments weave together in some way,  
23 that we are supporting the position that we are  
24 not really supporting, I obviously would want to  
25 respond.





1

2                   THE COMMISSIONER: You are quite  
3 happy to go ahead of Miss Kitely?

4                   MR. SHANAHAN: I am quite happy.

5                   THE COMMISSIONER: All right.

6                   Are any other parents happy to go ahead?

7                   MR. LABOW: I am quite prepared  
8 to go.

9                   MR. SHINEHOFT: I, as well.

10                  MR. TOBIAS: I certainly don't  
11 want to be characterized as the black sheep.  
12 I will go along with my friends.

13                  THE COMMISSIONER: All right, then,  
14 Mr. Labow, let's hear from you then.

15                  MR. LABOW: Mr. Commissioner, I  
16 support all of my friends who would like this  
17 argument, any argument, to be held in public for  
18 all of the reasons they have stated and I think  
19 we would be doing a great disservice to our  
20 clients, in particular, if any argument was heard  
21 in-camera, because it would put us into a very  
22 strange position at best. How could we report  
23 to them that we have done as full a job as we  
24 could if we had to present some of our argument  
25 to you without them being able to hear it? It is





1

2 this argument, and I think all argument here,  
3 and especially the parents' Counsels' argument,  
4 will be intertwined with the global situation  
5 presented by all the matters that have come  
6 you and I would find it near impossible to separate  
7 my argument out, to take out the pieces relating  
8 to identity for each of the six children that I am  
9 going to be referring to and argue that in one  
10 place and then argue at another time and in another  
11 place the rest of the argument, because it would  
12 not flow and you would not be able to get what  
13 I perceive to be the flavour of everything that  
14 has gone on that can characterize many of the  
15 situations that I would be referring to.

16

17 In addition, Mr. Commissioner, I  
18 have some difficulty with Mr. Thomson's position.  
19 It's always been my understanding that when a  
20 stated case is launched any evidence that  
21 directly affects the case, itself, can be objective  
22 at that time. In other words, when this stated  
23 case was launched in the fall, any evidence going  
24 to identity, I submit, could have been objected  
25 to then, and it is my understanding that you would  
not have been allowed to hear any of that evidence





1

2 if an objection had been launched until the  
3 case was determined. Then we went to the Court  
4 of Appeal and received their decision.

5 The concern of everyone here  
6 especially yourself, Mr. Commissioner, was that  
7 we not hear evidence that was totally irrelevant  
8 and lengthy argument was presented to you, and it  
9 is my impression that you were convinced that  
10 this argument, that these pieces of evidence  
11 had some relevance and if they were relevant,  
12 and they were not objected to, too strongly, and  
13 the evidence was allowed in, then I submit that  
14 we should be allowed to publicly argue it in  
15 front of you.

16 There doesn't seem to me to be  
17 any reason now to draw a line that we not drawn,  
18 as early as the fall, and once we have heard that  
19 evidence and it was proper before you then, I  
20 submit it is proper before you now, notwithstanding  
21 the fact that our clients do not want to unduly  
22 prejudice anybody here.

23 I strongly support the idea that  
24 any and all evidence we have heard, and any  
25 arguments put before you, be heard in public.





1

2

THE COMMISSIONER: Thank you.

3 Mr. Tobias?

4 MR. TOBIAS: Thank you, Mr. Commissioner.

5 I adopt in full, really, what my friend, Mr. Labow,  
6 has said. I have this particular difficulty with  
7 Mr. Thomson's position. Surely any argument going  
8 to the question of identity -- let's be clear  
9 what kind of general kinds of evidence that might  
10 be: the pattern, the presence of individuals,  
11 things seen being done by individuals at certain  
12 times and certain locations. All of that surely,  
13 taken on a global sense, must help you in  
14 characterizing the pattern on what happened globally  
15 to any number of the babies, perhaps all of them,  
16 perhaps somewhat less than all of them. That  
17 is surely the way you characterize the pattern,  
18 has to affect very strongly, in my submission, the  
19 conclusion that you might come to with respect  
20 to what happened with anyone or more of them.

21 THE COMMISSIONER: That is an  
22 argument. The real problem is whether that  
23 argument can be put. Let's assume that that  
24 argument can be put. The problem Mr. Hunt is  
25 raising is where should it be put, here or next door?





1

2 MR. TOBIAS: The submission I  
3 am making in the first instance --

4 THE COMMISSIONER: What is it  
5 they used? The bedroom television set. Turn it  
6 off.

7 MR. TOBIAS: The submission I  
8 make in the first instance goes to Mr. Thomson's  
9 position, that the argument shouldn't be put  
10 at all. That I can't disagree with more strongly.  
11 It seems to me that one of the very relevant  
12 circumstances, particularly with respect to the  
13 Hines child, is that it wasn't one isolated  
14 death, but it was part of a group of deaths, all  
15 of which, in sum issue and total, may be very well  
16 be characterized as suspicious. So that clearly  
17 the evidence going to identity has to be  
18 commented upon in argument.

19 The next question is where do  
20 we do that? I adopt the submissions of my friends  
21 who have argued quite strongly this morning that  
22 those arguments must be made in public, in a  
23 public forum. It is somewhat ironic that we have  
24 this argument on the very morning that Mr. Lamek  
25 was forced to comment upon the editorial carried





1

2 in the Sun. In that editorial, they made  
3 reference to proceedings in a Star Chamber. My  
4 great concern is that at this late stage, after  
5 we have been having what I perceive to be a  
6 very fair and very public process for almost one  
7 year that to go in camera will cause all sorts  
8 of irrelevant speculation in the public mind,  
9 as to what is going on in camera and it will  
10 be very much akin to a Star Chamber proceedings.  
11 As well, there is the practical problem of  
12 what happens when we get to comments that may  
13 be made by Counsel in reply as to certain things  
14 that have been said in camera.

15

16 My friend, Mr. Hunt, says, well,  
17 that is difficult, but not impossible, we will  
18 deal with that as it arises. I have this horror  
19 vision of the whole thing turning into a circus  
20 where we are running in and out of camera three  
21 or four times a day. I just don't think it is  
22 practical.

23

24 THE COMMISSIONER: We wouldn't  
25 do that. I would have to draw the line somewhere,  
as to what you can say where and we would presumably  
do the public part first and the in-camera part





1

2 afterwards. I don't think it would be impossible.

3 It would be difficult, but that isn't strange.

4 It isn't new to us around here.

5 I think it is the principle that  
6 we have to decide on. I don't really think it  
7 would be impossible to do it. It would be no  
8 more impossible than it would be to write the  
9 report on the basis --

10 MR. TOBIAS: No, I certainly would  
11 expect your observations would be no more difficult  
12 than reporting after you have heard the evidence  
13 probably, and I agree, but if we are concerned  
14 about the principle, clearly what we are involved  
15 with again is a balancing act. That is the public  
16 right to know that we went into all the proceedings,  
17 including the arguments, as against any possible  
18 prejudice.

19 One thing I do have a great deal  
20 of difficulty with which Mr. Roland touched upon,  
21 and I adopt his submission, is surely at this stage  
22 anyone who has been following these proceedings  
23 and following the evidence and has heard the  
24 various positions taken by Mr. Hunt and Mr. Percival,  
25 and by other Counsel, surely it is going to come





1

2 as no surprise to the members of the public  
3 what the views of those Counsel are and what  
4 submissions they intend to make to you on  
5 the evidence or what theories they have  
6 about how these children came to their death.  
7 I can't perceive that virtually anything that  
8 might be said to you in argument would come as  
9 a shock or as a surprise to the public, nor would  
10 it, in any way, be more prejudicial than what  
11 we have already had passed before us, and that  
12 is 11 months of public questioning. It is relevant  
13 that in those 11 months no subpoenas had to be  
14 issued, that all of the players came here and  
15 testified voluntarily, knowing what the ground  
16 rules were, knowing the kinds of questions they  
17 were going to face, and it just seems to me to  
18 be totally contrary to what you set out to do  
19 11 months ago to, at this point, allow portions  
20 of the argument to be in-camera.

21 Thank you, sir.

22 THE COMMISSIONER: Thank you.

23 Mr. Shanahan.

24 MR. SHANAHAN: Yes, sir. I think  
25 that the argument, sir, should be in public. The





1

2 reasons I say that are as follows: first of all,  
3 sir, as difficult as the subject matter of this  
4 commission has been, and that is the allegation  
5 of a serious rise in the number of deaths and  
6 the suggestion that some of these children, or  
7 many of these children may have been murdered, as  
8 difficult as it has been, never in the course of  
9 this commission have we ever received any  
10 submissions or any evidence in private, any  
evidence in private, in any event.

11

12 I think, sir, with respect, the  
13 public is sophisticated enough to be able to  
14 differentiate here what will come in the next  
15 few days and weeks will be argument, sir, argument of  
16 Counsel who are acting on behalf of interested parties  
17 and we are furthering the interest of those  
18 parties. In fact, they will be sophisticated  
19 enough, sir, to realize nothing that Counsel will  
20 say is, in fact, evidence. I think they will  
21 take a jaundiced eye, as they go through the days  
22 and hear the Attorney-General, the police and the  
23 parents, that they will realize the comments that  
24 are made on Monday may well be rebutted, if you  
25 like, or refuted or undermined by further argument





1

2 on a Tuesday by a Counsel who acts in an  
3 opposing interest.

4 I am mindful of the fact that  
5 reputations may be damaged by argument, but, sir,  
6 it is a physical area, as the role of the media  
7 expands, not only to report, but also to comment,  
8 and as we have a commission that must have a  
9 subject matter that really you have never seen  
10 the like of before, deaths bordering on a  
11 murder situation. Bear in mind, sir, that even  
12 the most basic presumption, that of a person in  
13 our society being presumed innocent until proven  
14 guilty, even that, sir, we can't guarantee. It  
15 is something that once a police officer charges  
16 an individual in the general sphere, people do  
17 make assumptions and presumptions and that, of  
18 itself, only operates to shift the evidentiary  
19 burden at a trial.

20 We can do nothing in terms of  
21 hamstringing the media so that that presumption  
22 won't be eroded.

23 Finally, with respect to Mr. Tobias'  
24 point about the question of identity and in the  
25 series of deaths, those children or those families





1

2 for whom I act, sir, that really is going to  
3 be a crucial area.

4 As I address myself to the issues  
5 of the Lombardo child, as high toxicology readings  
6 or what I perceive to be, and when I look at  
7 the absence and presence of certain individuals,  
8 certainly, sir, in terms of convincing you that  
9 it is part of a pattern and circumstances that  
10 were there, I will obviously be alluding to the  
11 issue of person or persons that were present and  
12 asking you to fit that child into a larger pattern,  
13 as one other piece of evidence leading to the  
14 conclusion that that child did not die of natural  
15 causes.

16

Once again, with the child Dawson,  
17 who perhaps doesn't have the toxicology from a  
18 clinical point of view again, sir, one of the things  
19 I will be referring you to will be the presence  
or absence of certain named individuals. It will  
be an important factor.

20

As you accepted, Mr. Thomson referred  
21 you to a sentence on page 4. The very next one,  
22 sir, really is the basis for you receiving the  
evidence and I'm going to submit to you the basis

23

24

25





ANGUS, STONEHOUSE & CO. LTD.  
TORONTO, ONTARIO

3752

1

2 for you receiving the argument.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25





hr

1

2

You said:

3

"In Phase I, we received evidence  
4 relating to identity both before and  
5 after the decision of the Court of  
6 Appeal. The justification for  
7 receiving it afterwards was that it  
8 related to the cause of death, an issue  
9 which was clearly left for me  
to determine".

10

I am suggesting to you, sir, that here in argument  
11 this evidence, and argument as well, that and  
12 only that will be the reason that I will be referring to  
13 the issue and I think it must be allowed.

14

THE COMMISSIONER: Mr. Shinehoft.

15

MR. SHINEHOFT: Mr. Commissioner, while  
16 I do have a certain amount of sympathy for Mr.  
17 Hunt's position I think that as a practical matter  
18 it is somewhat unworkable. I agree with Mr. Tobias.

19

THE COMMISSIONER: Leave it to me

20

to try to work it. I want the principle.

21

MR. SHINEHOFT: I say that you have  
22 to look at the pragmatic effect of agreeing to  
have argument in a certain way and I would suggest  
23 that we would be running in and out of here like  
24 rabbits putting on hats, one in camera and one not

25





1

2 in camera. I would submit that the practical  
3 application of having such --

4 THE COMMISSIONER: Surely I can just  
5 stop everything; just say, "Stop. No more." You  
6 will save that for next door when we come to that.  
7 Can't that work, wouldn't that work?

8 MR. SHINEHOFT: It wouldn't, Mr.  
9 Commissioner, in my submission, because I maybe  
10 saying one sentence and then say, pardon me, I have  
11 to go next door to finish that sentence.

12 THE COMMISSIONER: No, no. You would  
13 just leave that sentence out for a moment.

14 MR. SHINEHOFT: This whole Commission  
15 has been concerned about where you draw the line,  
16 do you not agree?

17 THE COMMISSIONER: Yes. I certainly would.

18 MR. SHINEHOFT: You have another  
19 problem that you are going to add to the existing  
20 problems of where you draw the line. Suppose you  
21 get close to the line, do you say, just a second,  
22 we have got to discuss the problem as to how close  
23 we are to the line, because we may be going next  
24 door? Or do we just continue until we cross the line  
25 and say, now, wait a second, you have gone too far,  
you can't argue this, you have got to go next door?





1

2 I think it is just compounding the problems that  
3 exist.

4 I again, have a certain amount of  
5 sympathy for Mr. Hunt's position.

6 The other thing, I guess it goes  
7 without saying, I assume almost everyone will  
8 agree with me, that I would rather argue this  
9 question in-camera than to not argue it at all.  
10 In other words, if you are contemplating saying no  
11 that you can't argue this and I think you said to  
12 Mr. Thomson earlier that is one of the fundamental  
13 rights that counsel do have, the right to at least  
14 address you and to present their submissions and  
15 their views and feelings, as to what went on and  
16 how and by what means these children came to their  
17 deaths, then I would suggest that we are entitled  
18 to do this, but if we are not and you are going to  
19 take the position that you would prohibit counsel  
20 from making argument in these areas then I would  
21 prefer to do it in camera than not at all.

22

-----

23

24 (N.B. page 3757 follows)

25





1

2 MS. KITELY: Thank you for your  
3 indulgence.

4 It would appear, sir, that there is  
5 really one argument and two parts of one argument in  
6 favour of an in camera hearing. Mr. Thomson's posi-  
7 tion that his client will be prejudiced if it's done  
8 in public and the related issue to that is that none  
9 of us can trust the - I'm getting some shaking heads;  
10 I don't know whether Mr. Thomson is indicating I  
11 have I mistated his position. I understood his  
12 position to be he didn't want it to be in public, if  
13 it was done.

14 The related issue to that is that, if,  
15 as you have expressed, there is some reason to not have  
16 confidence in accurate reporting.

17 Those two I see as being --

18 THE COMMISSIONER: I hope I didn't  
19 say that.

20 MS. KITELY: I understood you to  
21 say the headlines, sir.

22 THE COMMISSIONER: Well, no. It's  
23 the conception. What I'm worried about is the public  
24 conception of what is happening.

25 MS. KITELY: Which, I gather, you were  
26 referring to by saying, well, I'm concerned about the  
27 headlines, and you asked whether you could be





1

2 insulated from them.

3 THE COMMISSIONER: Well, the headlines  
4 could be perfectly accurate and I would still be con-  
5 cerned about the effect of them. I am not suggesting  
6 - I'm in enough trouble apparently -- well, no, I'm  
7 not; it's only my staff so far that are in trouble  
8 with the press. But it's -- well, you know what the  
9 problem is. In fact, you've been the greatest  
0 exponent of that problem, it seems to me, since we  
started.

11 MS. KITELY: I don't know whether I'd  
say "exponent".

13 THE COMMISSIONER: No, exponent not  
of a solution; I meant of the problem!

16 MS. KITELY: Well, the problem is, sir,  
17 I'm not coming down on either side. I would have  
18 liked on this issue to --

19 THE COMMISSIONER: Do you think I  
can do that, too?!

20 I adopt the argument of Miss Kitely  
21 in its entirety.

22 MS. KITELY: That would be delightful,  
23 sir. We might agree on something!

24

25





1

2 I would like to be able to come to a  
3 conclusion, sir. Unfortunately, because of the various  
4 positions that have been asserted by all the parties,  
5 this is one issue where we would be unable to.

6 Might I say, sir, though, the diffi-  
7 culty that I have on behalf of our clients is that we  
8 have always supported a public and open enquiry and  
9 if I can remind you again, the evidence of one of our  
10 clients has been described as being probably the most  
11 important evidence heard at this Inquiry and, to the  
12 extent that any of her evidence - I'm referring to  
13 Bertha Bell, sir - to the extent that any of her  
14 evidence is used or applied by my friends, it is in  
15 our interest that it be done in public.

16 On the other hand, I can appreciate  
17 the arguments for not holding it in public and,  
18 consequently, I am not in a position to take a position.

19 Thank you, sir.

20 THE COMMISSIONER: All right. Thank  
21 you.

22 MR. BROWN: I know I don't have a right  
23 of reply but I thought of something a bit late and  
24 perhaps I can interject now.

25 You ruled this morning, sir, that you  
weren't going to proceed with Phase II until the





1

2 difficult matter was resolved.

3 Some time ago, we collapsed Phase I and  
4 Phase II and, for four or five witnesses, heard  
5 evidence relating to both phases.

6 I would submit, sir, that evidence  
7 which they gave, which was admitted in order to assist  
8 you on Phase II, should not be referred to in the  
argument on Phase I.

9 THE COMMISSIONER: I agree. I agree.  
10 I don't think there can be any question about that.

11 Mr. Lamek.

12 MR. LAMEK: Mr. Commissioner, can I  
13 first - not because I think you are in any doubt as  
14 to what this is about; because there may perhaps be  
some confusion in other quarters - address one thing.

15 As I understand it, the question is  
16 not whether the argument as to the identification of  
17 a perpetrator should be in public or in private; the  
18 only argument that can be addressed before you in  
19 light of the Court of Appeal decision is as to the  
cause of death. As I perceive it, nobody is going to  
20 be contending that X or Y is a perpetrator for the  
sake of establishing the identity of a perpetrator.  
21 It is, rather, that some of the evidence that may be  
22 relevant to cause of death may reflect on individuals.

23

24

25





1

2 THE COMMISSIONER: Yes. That's so.

3 MR. LAMEK: And it is whether such  
4 references should be made publicly or privately that  
5 this question arises.

6 In that regard, my friend, Mr. Brown,  
7 referred to evidence going to the absence of his client  
8 at certain deaths and said that he and Mr. Sopinka  
9 would want to argue that that evidence indicated that  
10 she had nothing to do, not only with those deaths but  
with any deaths.

11 In my respectful submission, that  
12 misconceives the point. The evidence is not going to  
13 be argued about to show whether X or Y did or did not  
14 have anything to do with deaths, not to show who did  
15 it or didn't do it but, rather, might only be used  
as tending to show that something was or was not done.

16 Now that, at some point, may become  
17 rather metaphysical. I think it's rather important,  
18 Mr. Commissioner, to clarify precisely what it is  
we're concerned with.

19 THE COMMISSIONER: Would you say that  
20 again so I will understand it.

21 MR. LAMEK: Yes.

22 It may be that evidence may tend to  
23 show that X or Y did something. It will not be the

24

25





1

2 purpose of argument; it is not a matter upon which  
3 you can make a finding, sir, that X or Y did do  
4 something. The only relevance of that evidence may be  
5 that something was done.

6

7 THE COMMISSIONER: That's right. All  
8 right, I will accept that.

9

10 MR. LAMEK: The suggestion from Mr.  
11 Hunt, supported by Mr. Thomson, is that those submissions  
12 should properly be raised, if at all, in camera  
13 because of the prejudice that may accrue to the persons  
14 who are thus involved if their involvement is  
15 discussed publicly by counsel.

16

17 I have to say, sir, I am not unsympathetic to that argument and I take no strong  
18 position either for or against it. I am obliged to say that my sympathies tend to lie with those who  
19 oppose Mr. Hunt's suggestion, but not violently so. And perhaps all I can do, sir, in the hope to be of  
20 assistance to you, is raise a couple of considerations which I respectfully suggest you should have in mind  
21 when you come to a decision on the matter.

22

23 First, as has been said before, the evidence here has all been heard in public and, to retire from the public view when the stage arises for  
24 counsel to make submissions as to what all that public

25





1

2 evidence may mean, may be considered odd; it may,  
3 frankly, be even considered a little "cute".

4 Second, as I said earlier today, there  
5 has been a commitment from the beginning of the pro-  
6 ceedings of this Commission that, to the greatest  
7 extent possible, we would do whatever we do publicly.  
8 And, in light of the Attorney General's observations  
9 when he announced your appointment a little over a  
10 year ago, sir, observations as to the vital importance  
11 of having a full public airing of these matters, the  
12 commitment to proceeding publicly was, in my sub-  
13 mission, a sound one. It's still sound, and I suggest  
14 that those who now contend that portions of the argu-  
15 ment be held behind closed doors have the onus of  
showing that the commitment to public proceedings  
should be suspended.

16 In my submission, the suspensions  
17 should not lightly be granted.

18 Third, if, in your report, sir, you  
19 feel entitled and able to refer to all evidence bear-  
ing the cause of death, even though some of that  
20 evidence may also bear on the identity of a perpe-  
21 trator, you may want to - and I suggest you certainly  
22 should be free to - refer to the arguments that have  
23 been advanced by counsel.

24

25





1

2

I have even seen judgments by the  
Court of Appeal where there have been references to  
the arguments of counsel. Sometimes, they've even  
stated them correctly.

5

I suggest those things should be  
borne in mind when approaching the question.

7

If I may/something about the logistics  
because I confess I have sympathy with my friend,  
Mr. Shinehoft, on this - the practicality of achiev-  
ing the result should not, and I suggest cannot,  
totally be ignored, and I stress there are a couple  
of problems.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

The first goes to Mr. Labow's point,  
I think, that, in a sense, it is less than ideal in  
arguing the matter to deal with the identity-related  
submissions as a separate block, whether it be done  
at the outset or at the end. Argument, as I under-  
stand it and as I know you do, usually weaves strands  
in and out of the fabric of the whole affair in an  
attempt to make an effective synthesis of all of the  
evidence - in other words, I guess I'm saying one  
hopes to create a picture; not a patchwork quilt - and  
to hive off a block of evidence and attempt to deal  
with it as a separate matter will make it the more  
difficult to present an effective synthesis of all





1

of this evidence that may be of assistance to you.

3 There's another logistical problem  
4 because that, I suppose, goes to the effectiveness of  
5 argument; not the ability to make it, and that is the  
6 question - are we to have one mammoth in camera  
7 session either at the beginning or the end when each  
8 counsel, in turn, will say his piece on the non-  
9 public matters? That could be done, but I suggest it  
10 would be seriously disruptive of the total submission  
11 of each counsel. There will have to be a relation  
12 back between what he says in his turn in the in  
camera session with what he has said perhaps days or  
weeks before in the public session.

13

The alternative is to move in and out of in camera sessions - not ad hoc during the course of argument. But as each counsel prepares argument, he must say to himself, all right, this I can say in public; that I need to say in private. One way of dealing with it would be, as each counsel presents argument, for each counsel to have a public session and an in camera session, then move on to next counsel; same thing with him. That would be less disruptive of the argument of each individual counsel. It will, however, be disruptive of the proceedings.

23

All I say, sir, is that there's a

24

25





1

2 logistical price to pay for acceding to the suggestion  
3 of Mr. Hunt.

4                   Clearly, my sympathies lie with those  
5 who oppose it. I do say, sir, I don't oppose it  
6 strenuously. All I say, sir, it does, obviously,  
7 deserve very careful consideration and, in my  
8 respectful submission, should not be acceded to  
lightly.

9                   I don't think I can be of any further  
10 help.

11                   THE COMMISSIONER: Now, Mr. Hunt.

12                   I am not cutting you off, if you want  
13 to reply as well.

14                   MR. THOMSON: I would like to reply  
15 for about two minutes.

16                   THE COMMISSIONER: I think we will hear  
17 from you first, Mr. Thomson.

18                   MR. THOMSON: I would like to say two  
19 things.

20                   First, I am still puzzling over Mr.  
21 Lamek's submission that the argument ought to be  
22 limited to submissions as to what was done and  
23 was not done. I noted that and I understand, I think,  
24 what he means. I have great difficulty, though,  
25 perceiving that that is the way the argument is going





1

2 to be put and framed. Certainly, the questions put  
3 to my client were not along that line; they were  
4 far less - I think my friend used "metaphysical", far  
5 more blunt. In other words, as always, we have to  
6 look at the legal analysis on the one side and the  
7 practical reality on the other.

8 One of my friends made reference to the  
9 "star chamber" process and said that we were risking  
10 encountering a star chamber process. I say that  
11 what was wrong with the star chamber, fundamentally,  
12 as we now see from the 20th century, was that people  
13 were brought there and compelled to answer, sometimes  
14 under process of torture, allegedly, but, in any event,  
15 something was in secret that resulted in people being  
imprisoned, and we've groaned about that and said we  
can't do that again.

16 But, you see, in my process, in my  
17 perception, what none of my friends have really dealt  
18 with is the argument that essentially I have made - if  
19 you cannot exonerate and you cannot blame, then what  
possible justification is there to permit people, in  
20 metaphysical terms or not, to counsel, who are officers  
21 of the court, respected citizens, standing up accusing  
22 people of the crime of murder, which is what it amounts  
23 to.

24 I appreciate what Mr. Lamek says - if  
25





1

2 everybody wants to argue neatly, nicely, perhaps there  
3 isn't difficulty, but I don't expect that to be the  
4 real reality, and I go back to what I said to you  
5 before - I detect that you are not inclined to follow  
6 my submission but I will reiterate it once more. I  
7 urge you to decide initially how you propose to handle  
8 this very difficult effort that was described as a  
9 task almost impossible in your report. Mr. Scott  
10 read passages from the Court of Appeal judgment which  
11 satisfies his submission that there's really no  
12 problem here; just keep it moving down the track, which  
13 is what we agreed to before, and I say, well, at  
14 some stage, you've got to look at it and say the  
15 Court of Appeal recognized a pretty serious problem  
16 when they characterized your job as "almost impossible".  
17 What were they saying to you, sir?

18

I suggest what they were saying is  
exactly the point that I'm on now - if you're going  
to run through here, making findings with respect to  
arguments relating to the question of identity, you  
are going to be going on the side of the line the  
Court of Appeal characterized as the one which you  
don't belong on. For Mr. Scott to say, oh, well, in  
the earlier passages of the judgment, they said hear  
the evidence, hear the argument - and I agree they  
did - they throw in the final safeguard, which says,

19





1

2 in times of difficulty, lean on that side. And I,  
3 frankly, don't know how you can rule on the motion  
4 here without coming to some decision as to what use  
5 you are ultimately going to make of arguments of this  
nature.

6

Thank you, sir.

7

THE COMMISSIONER: Thank you, Mr.  
8 Thomson.

9

Mr. Hunt.

10

MR. HUNT: Sir, I detected in the  
11 submissions of my friend, Mr. Roland, that he felt  
12 this was really a problem solely related to my clients  
13 and not something that the others really have to be  
concerned with.

14

With great respect to him, he has  
15 missed the point.

16

This is a matter of balancing the  
17 public interest against the private interest, and that  
18 private interest is one of prejudice and damage to  
reputation that we've all been confronted with, both  
19 inside and outside the hearing room, for some number  
20 of months now.

21

The critical distinction in what has  
22 happened so far is that, contrary to what my friend,  
23 Mr. Thomson, has said, no one, no lawyer, alleged

24

25





1

2 to any witness here that they were a murderer or that  
3 they killed children and --

4 MR. THOMSON: You could have fooled  
5 me.

6 MR. HUNT: Well, that's the distinction  
7 that we're now faced with in terms of the submissions.

8 It may be that no one will make that  
9 submission to you in those bald terms, but Mr.  
10 Shanahan has come forward and given you an indication  
11 of what he is going to submit to you; he is going to  
12 refer to the presence or absence of certain indi-  
13 viduals with respect to certain deaths that he's going  
14 to argue. I take it his submissions go to the  
15 question of whether that death was foul play or whether  
16 it was natural causes.

17 You, in my submission, hit the nail  
18 on the head, that the question we all have to confront  
19 is that that's going to be reported and it's going to  
20 be reported because a lawyer said it to you, and it's  
21 going to carry, in my submission, much more impact  
22 than even the oblique lines of questioning that were  
23 put to witnesses when it's now all brought together  
24 and whatever package it's put in, it's going to be, in  
25 my submission potentially very damaging to the people  
who are named.





1

2 So, it's simplistic to suggest that  
3 this is a problem related to any particular client  
here.

4

5 I put this to you as a matter of real  
6 concern going to the credibility of the Commission,  
7 the public perception of what is happening here and,  
8 really, it is based in a submission of fairness, and  
9 that's the basic submission, really, that the Court of  
Appeal grappled with in their judgment.

10 They said that you couldn't do certain  
11 things because, if you did them directly or were even  
12 seen to do them, that was going to be unfair to  
13 someone, and they were so concerned about that, that  
14 they, as we all know, said you can't do what you  
had thought you could do; naming the names.

15

16 I submit to you that the issue here  
17 is one that really comes down to a balancing of  
18 interests that you have to do, and you have to be  
19 keenly aware of not just what the Court of Appeal  
20 said but the experience that we've all had over the  
21 last four months and what we've learned of the way  
22 in which the public perceives what is happening here  
23 and characterizes it and comments on it and that, as  
has been said to you before, is going to have a lot  
to do with the way in which the whole exercise is

24

25





1

2 perceived at the end of the day.

3 That, I submit to you, is really what  
4 is at the bottom of all of this.

5 Now, Mr. Lamek says to you that you  
6 should be free, in your report, to refer to the  
7 arguments of counsel, and I don't dispute that. I say,  
8 what better person to have to decide whether you are  
9 going to disclose any of the submissions that were  
made to you in camera in your report than you?

10 Surely, that is a much more satis-  
11 factory situation, to have you, Mr. Commissioner, in  
12 control of that type of matter, material, than to have  
13 the situation that we may face when you're con-  
14 fronted with fifteen, twenty counsel arguing positions  
15 to you and you have no control over what is said to you  
16 during the course of argument, or I should say, very  
17 little control, in an open argument, as to what is  
18 going to be said to you, and the lesson we've learned  
19 is that that's news. That's the news that goes out -  
20 and I don't criticize our friends in the media because  
21 that's the fact of it; it is news. But it's based on  
22 that information that's disseminated to the public that  
23 way that the perceptions of what we're doing is based  
on and the final judgment of the public on what we've  
done is going to be made.

24 So, I say that that problem that Mr.  
25





1

2

Lamek was raising is not a problem, and I welcome that  
being left to you to decide when you're writing your  
report - what should and should not be referred to.

5

As for the problems referred to by a  
number of my friends moving in and out of the hearing,  
the public hearing, into in camera sessions, that's  
mechanical; that's something we can have another  
argument if we have to, to determine the best way to  
do that. It really is not an integral factor in the  
real question that we have to grapple with here.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

My final point deals with Mr.

Thomson's first point, which is that there should be  
no argument on these issues at all.

I won't say any more on that than  
this: The reason that the evidence was received is  
apparent to all of us - it may assist you in character-  
izing a number of deaths. That being the case, then  
people are obliged to make submissions to you on that  
and you are obliged to consider them. You may find  
them of no value at all but that, again, takes us  
beyond the point that I am concerned with now, and that  
is what submissions will be made and how they're going  
to be perceived by the public when they're made and  
what effect that is going to have on the perception of  
the Commission in the final report.





1

2                   Weighing all those, I say you have  
3 the chance now to take a step that will really, I  
4 submit, prejudice no one - it may make our task more  
5 difficult, the lawyers, but that's part of the  
6 territory and no one should be overly concerned about  
7 that - and you have the opportunity to prevent what  
8 may be a great injustice, greater injustice than any  
9 that may have already occurred to a number of  
individuals. That's something you ought to take.

10                  THE COMMISSIONER: Fine. Thank you,  
11 Mr. Hunt.

12                  Now, I am certainly not going to  
13 decide it now. If anything, I think this is the  
most difficult problem that has arisen yet.

14                  All I can say to you is I will give  
15 it to you - it may not even -- it may just come out  
16 as a reserve judgment, I don't know. I will get it  
17 to you as soon as I can. Don't let that be an excuse  
18 for not preparing for argument. You may have to do  
19 some editing but I don't want anybody to say that  
this took you by surprise. I want you to consider  
20 the possibility that it will go either way.

21                  MR. TOBIAS: Mr. Commissioner, if I  
22 may just ask one question.

23                  Is it your intention, commencing June  
24 4th, to sit Fridays, or will you only be sitting four  
25





1

2 days a week?

3 THE COMMISSIONER: Well, I think it's  
4 the general view I shouldn't sit on Friday.

5 MR. TOBIAS: It's obvious that was  
6 the general view - I'm afraid to walk out of the  
7 hearing!

8 THE COMMISSIONER: Tell you what, I'll  
9 hear Mr. Tobias' argument on Friday!

10 All right then, until -- possibly  
11 you'll be called back; otherwise, not until ten o'clock  
12 on the 4th of June.

13 --- whereupon the hearing was adjourned at 12:45 p.m.  
14 until Monday, the 4th day of June 1984, at ten  
15 o'clock in the forenoon.

16

17

18

19

20

21

22

23

24

25





